No. _____

Supreme Court, U.S.
FILED
09-689 DEC 11 2009
OFFICE OF THE CLERK
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In The
Supreme Court of the United States

MARK J. HUNSBERGER;
CHERYL A. HUNSBERGER,

Petitioners,

v.

J. A. WOOD, Deputy Sheriff,
Botetourt County Sheriff's Office,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: December 11, 2009

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QUESTIONS PRESENTED

I. Whether the panel so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power when the opinion repeatedly analyzed disputed material facts in favor of the moving party in violation of Fed. R. Civ. Pr. 56?

II. Under the emergency and community caretaker exceptions to the Fourth Amendment what constitutes a reasonable belief of an imminent threat of serious harm to justify a warrantless home search, where the panel decision is in conflict with *Whiteley v. Warden*, 401 U.S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971), and *Brigham v. Stuart*, 547 U.S. 398, 403-04, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006) and the precedent upon which *Brigham* relied, *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1979); *Mincey v. Arizona*, 437 U.S. 385, 392, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978); and *McDonald v. United States*, 335 U.S. 451, 455, 69 S. Ct. 191, 93 L. Ed. 153 (1948)?

III. Under what circumstances is a civilian's presence during a warrantless home search violative of the Fourth Amendment where the panel decision approving of the civilian's presence conflicts with *Wilson v. Layne*, 526 U.S. 603, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)?

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court whose judgment is sought to be reviewed are included in the caption of the case.

Petitioners are individual persons and are not a nongovernment corporation, and no corporate disclosure statement is therefore required pursuant to Rule 29.6 of the Rules of the United States Supreme Court.

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CITATIONS TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED BY COURTS OR ADMINISTRATIVE AGENCIES

Hunsberger v. Wood, 583 F.3d 219 (4th Cir. 2009), *denying rehearing and rehearing en banc*

Hunsberger v. Wood, 570 F.3d 546 (4th Cir. 2009)

Hunsberger v. Wood, 564 F. Supp. 2d 559 (W.D. Va. 2008)

STATEMENT OF THE BASIS FOR JURISDICTION

Mark and Cheryl Hunsberger filed suit in the United States District Court for the Western District of Virginia pursuant to 42 U.S.C. § 1983, invoking the court's jurisdiction under 28 U.S.C. §§ 1331 and 1343. The district court denied cross motions for summary judgment in a memorandum opinion entered July 3, 2008. Wood appealed.

By order entered June 29, 2009, a Fourth Circuit panel reversed, finding Wood entitled to qualified immunity.

The Hunsbergers moved for rehearing and rehearing *en banc*. On September 14, 2009, the Fourth Circuit denied the motion by a five to four poll of the judges in a published opinion. Judge Motz's dissent concluded, "The panel's holding works an injustice on the Hunsbergers and creates an unsupportable and unsound precedent. I regret that

a majority of my colleagues have not seen fit to correct this affront to the Constitution and hope that another court will do so." *Hunsberger v. Wood*, 583 F.3d 219, 228 (4th Cir. 2009).

This Court has jurisdiction to review this matter on Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

THE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, ETC., INVOLVED IN THE CASE

Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 (*in pertinent part*):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

> deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ...

CONCISE STATEMENT OF THE CASE

Around 1:00 a.m. on February 3, 2007, Mark and Cheryl Hunsberger awoke to their 10-year-old daughter, J.H., screaming. Joint Appendix (J.A.) at 950, i.e., a four volume joint appendix prepared as part of the Fourth Circuit proceeding in this matter. J.H. screamed when she awoke to the presence of two strange men, one armed with a firearm, in her second-story bedroom. The men had entered and searched her room, to include pulling the covers partially down to expose her unclothed body. *Id.* at 1349-50.

Thus was the culmination of J.A. Wood's warrantless search of the Hunsberger home on a cold night in February 2007. Wood was the armed man, a sergeant of the Botetourt County Sheriff's Office, who in an 18-year career has never obtained a search warrant and has never served a search warrant, except to assist a neighboring jurisdiction on one occasion. *Id.* at 1395. William Blessard, who was not a law enforcement officer, accompanied Wood on the search without objection from Wood. *Id.* at 1361.

The events leading to the search began when Charlene Klik – a single, middle-aged woman who

lived alone across the street from the Hunsbergers, called 911 around 10:00 p.m. to report cars coming and going from the Hunsberger home and making her dogs bark. *Id.* at 1604. The dispatcher forwarded the report to Wood and another deputy, Jody Edwards: "She just told me to send the cops out there, suspicious behavior. And when I asked her some more questions, she hung up again." *Id.* at 1605. In response, Wood and Edwards went to the upper middle class neighborhood where Klik and the Hunsbergers lived.

Edwards spoke to Klik. She reiterated her complaint of cars coming and going but added that she did not know if the Hunsbergers were home. Wood and Edwards noted two cars parked in front of the Hunsberger's large, upward sloping front yard. Also, they noticed lights illuminated inside the home. *Id.* at 1270-71. After watching the home for approximately 15 minutes and observing nothing out of the ordinary the officers departed the area. *Id.* at 1270 and 1273.

Klik called 911 again around midnight. She reported that "there's a lot of activity over there and the cars are coming ... are keeping me awake all night. It's very suspicious behavior going on over there ...." *Id.* 1610. Wood and Edwards again responded. *Id.* at 1276. This time Wood parked at a distance from the Hunsberger home and surreptitiously watched it. He saw a light turn on in a room on the first floor of the home. A young man walked through the room, and then the light was extinguished. *Id.* Also, Wood observed that now three cars were parked in front of the home. Then,

Wood spoke to Klik who reiterated her complaints. *Id.* at 1112, 1268-69.

Wood decided to go to the Hunsberger home and ask the occupants to keep it down – despite having never heard any noise. *Id.* at 1283-84. Wood and Edwards drove their patrol cars up the long driveway to the Hunsberger home. As they drove onto the driveway Wood and Edwards testified that lights inside the home went out. *Id.* at 1284. This testimony is disputed. The record reveals that at the time the officers advanced toward the Hunsberger residence that (1) everyone on the second floor of the residence was asleep (*Id.* at 1436-38, 949-52, 1485-86); (2) on the first floor no lights were on (*Id.* at 148-49, 537-38); (3) at least three persons were outside the rear of the residence who became aware of the officers' presence only when the officers had driven to the top of the driveway (*Id.* at 647-49, 51-52); and (4) the persons in the basement did not become aware of the presence of law enforcement until one of the persons outside came to the basement and told them, by which time the officers were already at the top of the driveway (*Id.* at 649-50, 749-50).

The driveway approaches the Hunsberger home on the left and wraps around to the back of the home ending at a two-car garage. *Id.* at 1048, plat of Hunsberger property. The officers exited their vehicles and walked across the front lawn of the home in the direction of the front door. Testimony is disputed whether the two men knocked on the front door and/or rang the doorbell: five people inside the home testified that they never heard the doorbell ring, nor did they hear knocking on the front door.

Id. at 949-37; 1485-86; 1436-37, 62, 67; and 284, 288-89. What is undisputed is that the men searched the curtilage of the home, looking in windows and otherwise searching the property: they found nothing out of the ordinary. *Id.* at 1413, 1420 and 1423. During their search they noted two additional automobiles parked at the rear of the home. *Id.* at 1296.

Next, Wood and Edwards entered the garage through an unlocked walk-through door. They testified that the door was ajar, but this testimony is disputed: Matt Deane, the second of two people to exit the door, testified that he shut the door. *Id.* at 150. The two officers shined their flashlights around the garage, noted nothing more than a disorganized garage used to store typical family belongings and exited. *Id.* at 1292-93.

Wood and Edwards retreated to the street – taking time to back their patrol cars out of the driveway. Then they obtained and reported to their dispatch center the license plate numbers of the five vehicles parked at the home. Wood told the dispatcher to contact the owners of all vehicles that "did not come back to this home." *Id.* at 1296. The three vehicles parked along the street fit this description. The dispatcher called the owners of the vehicles by obtaining registration information from the Department of Motor Vehicles and looking up the owners' names in the telephone book. The dispatcher forwarded the calls to Wood's cellular telephone. *Id.* at 1613-28.

While speaking to the callers Wood opined that the teenagers who had been driving the vehicles were probably drunk, and threatened to tow the vehicles if the owners, i.e., the parents, did not come immediately and remove the cars from the premises. *Id.* The parents complied. Wood never asked any of the parents about the Hunsberger home, for example: whether they knew the persons who lived there, or whether they knew if the homeowners were gone for the weekend. He did not inquire concerning any suspicion he may have had. *Id.*

The Hunsbergers' home telephone number is listed in the local telephone book. *Id.* at 1639. Wood never attempted to contact the Hunsbergers by telephone, nor did he direct dispatchers to do so. *Id.* at 1296-97, 1364. In fact, he directed the dispatcher to call only the owners of vehicles that "did not come back to this home." *Id.* at 1296. Wood never even learned the name of the homeowners.

The first parent to arrive was William Blessard: his step-daughter, A.W., had been driving one of the vehicles. *Id.* at 1306. Thereafter, other parents arrived, retrieved their respective vehicles and left. Blessard, however, told Wood that 17-year-old A.W. was not where she was supposed to be and he was upset about it. *Id.* at 1308-09. Wood suggested that they knock on the front door of the Hunsberger home to see if someone would come to the door. *Id.*

They walked up the long driveway and turned onto the sidewalk leading to the front door. Wood claimed that as they passed in front of the garage he

heard a noise. *Id.* at 1309. This testimony is disputed because no evidence exists that anything occurred in the home to create any noise. *See* J.A. at 56-57, deposition of Aaron Cooper; J.A. at 284, deposition of A.H.; J.A. at 753-56, deposition of Z.H. In response they went to the side of the house and re-entered the garage through the walk-through door. Wood testified that he and Blessard had no conversation upon entering the garage:

> Q: ... you didn't tell him to come in, but you didn't tell him to leave either?
>
> A: Correct.

Id. at 1361.

Curiously, testimony is disputed whether Edwards accompanied the men to the house. Wood and Blessard do not mention Edwards, but Edwards testified otherwise: "Sgt. Wood, Mr. Blessard and I went back to the garage door and went inside." *Id.* at 1423. Edwards did not accompany Wood and Blessard on the search of the Hunsberger home; Wood never requested back up from any law enforcement officer. *Id.* at 1310. Nor did Wood ever unholster his weapon, or "cover" his weapon in a ready position. *Id.* at 1329. Neither did Wood turn down the volume on his personal police radio to prevent inadvertently alerting whomever he sought inside the home. *Id.* at 1319-20.

Upon entering the home Wood directed Blessard to a set of stairs leading to a basement door. Blessard went to the door and found it locked. He knocked loudly on the door and yelled for A.W. to come out. No one responded. *Id.* at 1311-12.

Next, through another door leading from the garage, they entered the kitchen/den area on the first floor. Blessard then revealed to Wood that the home was laid out like his former home. *Id.* at 1322-23. He led Wood to a second staircase to the basement. The pair descended the stairs and searched the basement. *Id.* at 1322. They saw "a carton of beer [with] some cans missing," but nothing of significance. *Id.* at 1326.

Returning to the first floor, they walked the circumference of the interior of the home and found nothing amiss. *Id.* at 1332, 1335. After that they ascended the stairs to the second floor. *Id.* at 1336. They searched one bedroom and found nothing. In the second bedroom they found the Hunsbergers' 15-year-old son, L.H. Wood asked him, "Where are they?" L.H. responded quizzically, "They're not here?" *Id.* at 1343-44. Then, L.H. walked past Wood and Blessard and down the stairs out of their sight. Wood did not question L.H. further, nor did he pursue or otherwise secure the home by restraining L.H.'s movement. *Id.* at 1344.

Wood and Blessard continued to the next bedroom. The men opened the door and saw a person laying in the lower of two bunk beds arranged perpendicular to one another. Wood walked into the room and stood at the foot of the bed.

He grabbed the covers along the foot of the bed and pulled the covers down to reveal 10-year-old J.H. *Id.* at 1441-42, 1457. In response she screamed waking her father and mother in the adjacent bedroom. *Id.* at 950, 1444.

Mark Hunsberger exited his bedroom still adjusting his bathrobe, and was confronted with the two, suddenly sheepish-looking men exiting J.H.'s bedroom. *Id.* at 952. He asked what was going on. Wood responded that they were looking for "this man's" daughter. *Id.* at 953-54. Mr. Hunsberger suggested that they go downstairs to talk. As the men retreated down the stairs Mr. Hunsberger was admittedly becoming upset that these two men, one a police officer, were in his home unannounced late at night. *Id.* at 956.

Ultimately, Mr. Hunsberger demanded that the men leave by the nearest door. *Id.* at 956-57. Wood refused to leave except by the door through which he had entered the home. *Id.* at 957. Mr. Hunsberger directed Mrs. Hunsberger to call 911 and report a break-in. Meanwhile, Wood exited the home and called for his supervisor, Lt. Blessard: "As soon as my feet hit the pavement out here I called my lieutenant on the radio, advised him to respond to this residence ... because I expected [Mr. Hunsberger] to file a complaint." *Id.* at 1358-59.

The Hunsbergers lodged a complaint with Lt. Blessard. After that they waited: Botetourt County Sheriff Ronnie Sprinkle never responded to the complaint. Seeing no other means of recourse the

Hunsbergers filed suit in the United States District Court for the Western District of Virginia.

The Hunsbergers invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331 and 1343. They alleged violations of their rights under the Fourth and Fourteenth Amendments to the United States Constitutional pursuant to 42 U.S.C. § 1983. Additionally, the Hunsbergers alleged common law trespass, and violation of state law pertaining to unlawful searches by law enforcement officers.

STANDARD OF REVIEW

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is *no genuine issue as to any material fact* and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(c), *emphasis added*. "[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

This Court "review[s] the [decision on] summary judgment *de novo*, applying the same legal standards as the district court and viewing the facts and inferences drawn from the facts in the light most favorable to ... the nonmoving party." *Evans v.*

Technology Applications & Services, Co., 80 F.3d 954, 958 (4th Cir. 1996), *citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986), *and Nguyen v. CNA Corp.*, 44 F.3d 234, 236-37 (4th Cir. 1995). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255, *cites omitted.* Also see *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149-51 (2000), *cites omitted.*

The Court considers whether Wood is entitled to qualified immunity only if it finds that no genuine issues of material fact exist. If Wood overcomes that hurdle then the Court must determine (1) whether the alleged constitutional rights were violated, or (2) if a constitutional right was violated whether the law concerning that constitutional right was clearly established at the time of the violation. *Pearson v. Callahan*, 129 S. Ct. 808, 818, 172 L. Ed. 2d 565, 550 U.S. ___ (2009), and *Saucier v. Katz*, 533 U.S. 194, 200-01, 121 S. Ct. 2151; 150 L. Ed. 2d (2001).

ARGUMENT

I. Whether the panel so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power when the opinion repeatedly analyzed disputed material facts in favor of the moving party in violation of Fed. R. Civ. Pr. 56?

In this case the Fourth Circuit panel failed to resolve all disputed facts and draw all reasonable inferences in favor of the Hunsbergers. Genuine issues of material fact exist that preclude summary judgment in Wood's favor. The decision of the panel, therefore, must be reversed. Specifically, the panel relied on disputed material facts to conclude that "the objective circumstances at the time of Wood's entry would cause a reasonable officer to believe that there was an [imminent] emergency requiring prompt entry." *Hunsberger v. Wood*, 570 F.3d 546, 555 (4th Cir. 2009).

The majority relied upon the following facts to find that Wood had an objectively reasonable basis to enter and search the Hunsberger home:

> First, the circumstances indicated the strong possibility of an unauthorized intruder in the home. Klik, the Hunsbergers' neighbor, had said that she thought the Hunsbergers were out of town. There appeared to be someone inside the home who wished to avoid contact with the police; when the

> officers first arrived, someone in the house turned the lights off, and then later the open door in the garage suggested that someone had fled the home while the officers were at the front door. Three cars not belonging to the Hunsbergers were parked in front of the house. No one came to the front door when the officers rang the doorbell, and no one answered when Wood and Blessard knocked on the basement door repeatedly. Furthermore, a vacant home in the neighborhood had recently burned down as the apparent result of unauthorized use.
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> ...
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> Second, there was evidence that a minor girl was in the home, given that her car was parked in front of the house. The girl's stepfather said that she was not supposed to be at the home and was exceedingly concerned for her welfare, especially given that it was the middle of the night. ... The fact that the girl was not answering her cellphone suggested the possibility that she was hurt or otherwise in need of assistance.

Hunsberger, 570 F.3d at 555. A close reading of the record reveals, however, that these facts are genuinely disputed. Wood has not satisfied his burden of "showing conclusively that there exists no genuine issue as to a material fact." *Smith v.*

Hudson, 600 F.2d 60, 63 (6th Cir. 1979), *citing Adickes v. Kress & Co.*, 398 U.S. 144, 157, 158-59, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970) *and United States v. Diebold*, 369 U.S. 654, 655 (1962) (*per curiam*), *other cites omitted.*

First, the panel erroneously accepted and relied upon as undisputed that the lights in the Hunsberger home went out as Wood drove up the driveway, and inferred therefrom that the occupants of the home sought to conceal themselves from law enforcement. *Hunsberger*, 570 F.3d at 555. The Hunsbergers dispute that the lights were extinguished in the home as Wood entered the driveway. The panel erroneously relied upon this disputed fact to support Wood's reasonableness in searching the home.

Wood and Edwards testified that the lights went out. J.A. at 1413. But other testimony from Wood and the testimony of other persons at the home contradict this assertion: everyone on the second floor of the residence was asleep (*Id.* at 1436-38, 949-52, 1485-86); on the first floor no lights were on (*Id.* at 148-49, 537-38); none of the persons outside the rear of the residence became aware of the officers' presence until they had driven to the top of the driveway (*Id.* at 647-49, 51-52); and the persons in the basement did not become aware of the officers until someone outside came to the basement and told them (*Id.* at 649-50, 749-50).

Second, the panel relied upon an open walk-through garage door to support Wood's reasonableness in searching the Hunsberger home.

Wood testified that the door was open, but Matt Deane, the second of two people to exit the door and a non-party to these proceedings, testified that he shut the door. J.A. at 150. Nonetheless, the panel accepted as undisputed that the door was open and imputed knowledge and inferences in favor of Wood based upon this fact. Whether the door was open is a material fact in dispute and should not have been relied upon to determine whether Wood acted reasonably in searching the Hunsberger home.

Third, the panel relied on the failure of anyone to answer the front door as a basis for Wood's reasonableness to search the home. The evidence is in dispute whether Wood knocked on the front door and/or rang the doorbell. Five people inside the house: Mark Hunsberger, Cheryl Hunsberger, J.H., Aaron Cooper and A.H., all testified that they never heard the doorbell ring, nor did they hear anyone knock on the front door. *See* J.A. at 949-50, Deposition of Mark Hunsberger; 1485-86, Deposition of Cheryl Hunsberger; 1436-37, Deposition of J.H.; 62, 67, Deposition of Aaron Cooper; and 284, 288-89, Deposition of A.H. Whether Wood knocked on the front door and rang the doorbell is a genuine issue of material fact, and the panel erred in relying on it.

Fourth, a genuine issue of material fact exists whether Wood heard a noise in the garage on his second approach to the home. *Hunsberger*, 570 F.3d at 551. Edwards' typewritten report makes no mention of hearing any noise in the garage upon their second approach. J.A. at 1423 ("Sgt. Wood, Mr. Blessard and I went back to the garage door and went inside."). A fact relied upon by Wood to re-

enter the house surely would have deserved comment in Edwards' report, if it occurred. Likewise, no person inside the house at that time testified to making a noise. *See* J.A. at 56-57, deposition of Aaron Cooper; J.A. at 284, deposition of A.H.; J.A. at 753-56, deposition of Z.H. Nonetheless, the panel accepted as fact that Wood heard the noise and relied upon the noise, in part, as justification to enter and search the Hunsberger home.

Fifth, the evidence is in dispute whether Blessard was concerned for A.W.'s welfare, versus being angry that she had lied to him about her whereabouts. Wood's handwritten and typewritten reports make no mention of Blessard's concern for her welfare:

> Mr. Blessard arrived first. I explained what I observed. He stated his 16 year old daughter had stolen his keys to the car. He stated he wanted the car towed to his house. He did not have a preference for a tow service ... .

J.A. at 1421; *also see* J.A. at 1423, Edwards' report. Likewise, after searching the Hunsberger home no one seemed to be overly concerned for A.W.'s welfare or whereabouts. J.A. at 442-46, deposition of William Blessard; 1368-69, deposition of Wood; 1134-35, deposition of Jody Edwards. The panel accepted as undisputed that Blessard was very worried about his daughter's well-being and relied on this fact to justify the search of the Hunsberger home.

Sixth, whether Blessard acted with the express or implied consent of Wood in entering and searching the Hunsberger home is in dispute. Wood and Blessard deny any such consent. But persons inside the home testified that the pair searched the home together and were communicating to effect the search. J.A. at 62, Deposition of Aaron Cooper; 284-85, Deposition of A.H.

Not only did the panel erroneously consider disputed facts, it also ignored facts and inferences that, taken in the light most favorable to the Hunsbergers, were sufficient to deny Wood qualified immunity. For example, the panel ignored that:

> (1) When Appellant first responded to the scene, nearly two hours before his search of the home, his observations admittedly revealed nothing of suspicion. *Hunsberger*, 570 F.3d at 550. Receipt of the same complaint after a two-hour lapse cannot suddenly create an imminent emergency.
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> (2) Upon Wood's second trip to the home he and Edwards had "shined [their] flashlights into the windows" of the home and saw nothing amiss. J.A. at 1413, *also see* J.A. at 1420 and 1423.
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> (3) Wood knowingly and purposefully ignored the two Hunsberger vehicles parked at the rear of the home as evidence that someone who lived there may be home. Specifically he requested only "info for vehicles that didn't belong there" when he asked his dispatch

center to contact the owners of the vehicles parked at the home. J.A. at 1423, *see also* J.A. at 1421.

When an officer is deciding whether he has probable cause to enter and search a home without a warrant he must consider the totality of the circumstances, i.e., all the facts; he cannot ignore evidence that disputes the facts he wants to rely on to enter and search. *U.S. v. Moses*, 540 F.3d 263, 269 (4th Cir. 2008). The panel ignored these material facts and erroneously found that Wood's actions were reasonable.

Genuine issues of material fact exist that preclude summary judgment, and the panel ignored material facts that weighed against awarding Wood summary judgment. The facts in the light most favorable to the Hunsbergers, i.e., the non-moving party, indicate that Wood had no reasonable belief that an imminent emergency existed at the home justifying a warrantless entry. Therefore, the Court should find that the panel erred in awarding summary judgment to Wood.

II. Under the emergency and community caretaker exceptions to the Fourth Amendment what constitutes a reasonable belief of an imminent threat of serious harm to justify a warrantless home search, where the panel decision is in conflict with *Whiteley v. Warden*, 401 U.S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971), and *Brigham v. Stuart*, 547 U.S. 398, 403-04, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006) and the precedent upon which *Brigham* relied, *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1979); *Mincey v. Arizona*, 437 U.S. 385, 392, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978); and *McDonald v. United States*, 335 U.S. 451, 455, 69 S. Ct. 191, 93 L. Ed. 153 (1948)?

Wood's *post hoc* justification for searching the Hunsberger home without a warrant was to assist a civilian in locating his teenage step-daughter and/or to determine whether the Hunsberger home was being vandalized or burgled. Under these excuses a reviewing court must determine whether exceptions to the warrant requirement of the Fourth Amendment justify the warrantless search. The emergency and the community caretaker exceptions permit warrantless searches under very limited circumstances.

A qualified immunity analysis asks (1) whether the alleged constitutional rights were violated, and (2) if a constitutional right was violated whether the law concerning that constitutional right was clearly established at the time of the violation.

Pearson v. Callahan, 129 S. Ct. 808, 818, 172 L. Ed. 2d 565, 550 U.S. ___ (2009), and *Saucier v. Katz*, 533 U.S. 194, 200-01, 121 S. Ct. 2151; 150 L. Ed. 2d (2001). A court can take up either question first, and a negative answer to either question results in summary judgment for the government defendant. *Pearson, supra.* In this case, the Court must ask whether the Hunsbergers have alleged violation of their Fourth Amendment rights in light of the emergency and community caretaker exceptions, and whether the pertinent law concerning the emergency and community caretaker exceptions was clearly established at the time of the violation.

A. The Hunsbergers have alleged the deprivation of an actual constitutional right.

In this case the evidence taken in the light most favorable to the Hunsbergers establishes that Wood violated their right to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *Fourth Amendment to the U.S. Constitution. Also see Wilson v. Layne*, 526 U.S. 603, 609, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999) ("alleged the deprivation of an actual constitutional right"), *quoting Conn. v. Gilbert*, 526 U.S. 286, 290, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999) (*citing Siegert v. Gilley*, 500 U.S. 226, 232-33 (1991), and *County of Sacramento v. Lewis*, 523 U.S. 833, 841, n.5 (1998)); *also see Saucier v. Katz*, 533 U.S. 194, 201 (2001).

Protection from unwarranted intrusion into the home is perhaps the most coveted of constitutional protections: "'[a]t the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Kyllo v. U.S.*, 533 U.S. 27, 31, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001), *quoting Silverman v. United States*, 365 U.S. 505, 511, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961). *Also see Georgia v. Randolph*, 547 U.S. 103, 115, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006) ("[T]he home is entitled to special protection as the center of the private lives of our people," *quoting Layne*, 526 U.S. at 610 (1999), and *Minnesota v. Carter*, 525 U. S. 83, 99, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998) (Kennedy, J., concurring).); *Groh v. Ramirez*, 540 U.S. 551, 564, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004) ("No reasonable officer could claim to be unaware of the basic rule, ... that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional," *citing Payton v. New York*, 445 U.S. 573, 586-88, 100 S. Ct. 1371, 1380, 63 L. Ed. 2d 639 (1980).); *Wilson*, *supra*; *Illinois v. Rodriguez*, 497 U.S. 177, 190, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990) ("Exceptions to the warrant requirement must therefore serve 'compelling' law enforcement goals," (Marshall dissent) *quoting Mincey v. Arizona*, 437 U.S. 385, 394, 98 S. Ct. 2408, 2414, 57 L. Ed. 2d 290 (1978)); *Welsh v. Wisconsin*, 466 U.S. 740, 749, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984):

> "[A] 'basic principle of Fourth Amendment law [,]' [is] that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S., at 586, 100 S. Ct. at 1380. *See Coolidge v. New Hampshire*, 403 U.S. 443, 474-475, 91 S. Ct. 2022, 2042-2043, 29 L. Ed. 2d 564 (1971) .... *See also Michigan v. Clifford*, 464 U.S. 287, 296-297, 104 S. Ct. 641, 646, 78 L. Ed. 2d 477 (1984) (*plurality opinion*); *Steagald v. United States*, 451 U.S. 204, 211-212, 101 S. Ct. 1642, 1647-1648, 68 L. Ed. 2d 38 (1981); *McDonald v. United States*, 335 U.S. 451, 456, 69 S. Ct. 191, 193, 93 L. Ed. 153 (1948); *Johnson v. United States, supra*, 333 U.S. [10], 13-15, 68 S. Ct. [367], 368-370 [92 L. Ed. 436 (1948)]; *Boyd v. United States*, 116 U.S. 616, 630, 6 S. Ct. 524, 532, 29 L. Ed. 746 (1886);

Payton v. New York, 445 U.S. at 586: "[T]he principles reflected in the Amendment ... 'apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life.'" *Boyd v. United States*, 116 U.S. 616, 630, 6 S. Ct. 524, 532, 29 L. Ed. 2d 746 [(1886)]; *Coolidge v. N.H.*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971) ("The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned," *quoting Wolf v. Colorado*, 338 U.S.

25, 27-28, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949)); *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions"); *McDonald v. United States*, 335 U.S. 451, 453, 69 S. Ct. 191, 93 L. Ed. 153 (1948): "This guarantee of protection against unreasonable searches and seizures ... marks the right of privacy as one of the unique values of our civilization and, with few exceptions, stays the hands of the police unless they have a search warrant ...." As a result, "[w]ith few exceptions, the question of whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo*, 533 U.S. at 31, *citing Rodriguez*, 497 U.S. at 181, and *Payton*, 445 U.S. at 586. Wood does not contest that he did not have a search warrant. Therefore, unless Wood can establish a "compelling law enforcement [goal]" (*Rodriguez*, *supra*) pursuant to "a few specifically established and well-delineated exceptions," (*Katz*, *supra*) then he violated the Hunsbergers' constitutional rights.

In this case, the only possible justifications for Wood's warrantless search are embodied in the emergency and the community caretaker exceptions. But the emergency and community caretaker exceptions do not apply in this matter because no imminent threat to person or property existed that required immediate entry into the Hunsberger home.

"To invoke this so-called 'emergency doctrine,' the person making entry must have had an objectively reasonable belief that an emergency existed that *required immediate entry* to render assistance or prevent harm to persons or property within." *U.S. v. Gillespie*, 332 F. Supp. 2d 923, 927 (W.D. Va., 2004) (*emphasis added*), *quoting United States v. Moss*, 963 F.2d 673, 678 (4th Cir. 1992); *see also Mincey v. Arizona*, 437 U.S. 385, 392, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). The danger must be imminent. *Brigham*, 547 U.S. at 403-04 ("imminent injury"), *also see Mincey*, 437 U.S. at 392 ("in need of immediate aid") and *McDonald*, 335 U.S. at 455 ("grave emergency"). To justify a search based upon the emergency doctrine the probability of harm must exist, the harm must be imminent and the severity of the harm must be grave. *Mora v. Gaithersburg*, 519 F.3d 216, 224 (4th Cir. 2008) (report of a planned mass murder-suicide – "As the likelihood, urgency, and magnitude of a threat increase, so does the justification for and scope of police preventive action."); *Moss*, 963 F.2d at 678 ("imminent threats of death or bodily harm."). *Also see O'Donnell v. Brown*, 335 F. Supp. 2d 787, 804-05 (W.D. Mich., 2004) (*cites omitted*) (search of a home unconstitutional where parents left children under the care of teenage siblings, and relatives complained to police.):

> [T]he authorities must be presented with *a true immediacy and a real danger that serious consequences would certainly occur*. Exigent circumstances do not exist where no evidence indicates that [anyone was] in immediate threat

> of death or severe physical harm. *The mere possibility of danger is not enough.*

O'Donnell, 335 F. Supp. 2d at 804-05 (*emphasis added, citing Tenenbaum v. Williams*, 193 F.3d 581, 594 (2d Cir.1999)).

Similarly, the community caretaker "exception to the warrant requirement allows officers who are serving as 'community caretakers,' protecting the safety of persons or property, to make warrantless searches." *Gillespie*, 332 F. Supp. 2d at 929, *citing Phillips v. Peddle*, 7 Fed. Appx. 175, 178 (4th Cir. 2001). The recent Supreme Court case of *Brigham v. Stuart*, 547 U.S. 398, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006), appears to have eliminated any meaningful distinction between the emergency and community caretaker exceptions. *Brigham*, 547 U.S. at 406. *Brigham* succinctly states that, "law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Id.*, 547 U.S. at 403. This Court found significant in *Brigham* that "the officers were confronted with *ongoing* violence occurring *within* the home." *Id.*, 547 U.S. at 405 (*emphasis in original*). *Brigham* and *Mora* both emphasize that the severity of the emergency is crucial in determining whether entry is justified. However, *Brigham* did not address whether a warrantless entry merely to protect property is of sufficient severity. *Id.*

In this case, contrary to *Brigham*, 547 U.S. at 403-04, the panel omitted the "imminent danger" requirement. This omission also contradicts the precedent upon which *Brigham* relies: *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1979); *Mincey v. Arizona*, 437 U.S. 385, 392, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978); *McDonald v. United States*, 335 U.S. 451, 455, 69 S. Ct. 191, 93 L. Ed. 153 (1948); *Mora v. Gaithersburg*, 519 F.3d 216, 224 (4th Cir. 2008); and *U.S. v. Moss*, 963 F.2d 673 (4th Cir. 1992). The undisputed, objective facts in the light most favorable to the Hunsbergers fail to establish a serious imminent threat to person or property.

The undisputed, objective facts are that: (1) On a Friday night a neighbor called the police twice over a two-hour period complaining of cars coming and going from the Hunsberger home and that she did not know if they were home; (2) On Wood's first visit to the area he observed lights on inside the house, but nothing out of the ordinary; (3) On Wood's second visit to the area he observed a young man walk through a lit room in the home and then turn off the light; (4) Five automobiles were parked at the Hunsberger home, including three along the street that were registered at addresses other than the Hunsberger residence; (5) Wood's and Edwards' search of the curtilage and garage revealed no signs of vandalism or burglary; and (6) Blessard told Wood that his step-daughter was supposed to be elsewhere, he was upset that she had lied to him about where she was spending the night, and he could not reach her on her cell phone.

Other objective facts actually contradicted any suspicion of a serious imminent threat: no vehicles were idling at the house loaded with household goods from the Hunsberger residence in expectation of a quick getaway. J.A. at 1339. No graffiti, broken lamps, or shattered glass was observed anywhere outside or inside the home – the house had not even been the subject of a prank as harmless as being laced with toilet paper. J.A. at 1338-39 and 1361-62. Further, Wood testified at deposition that he never observed anything out of place in the garage, or anywhere else in the house. J.A. at 1292-93, 1313 and 1322.

These facts establish belie the existence of an imminent emergency. At best, Wood had one or more teenagers at a residence, who may or may not have adult supervision, and who had taken measures to avoid contact with anyone who may come to the house at the late hour. Wood's only legitimate, i.e., reasonable, suspicion was that a group of underage persons had gathered in a private home on a Friday night to drink some beer. But this is not a sufficiently serious crime or emergency to justify a warrantless search of a home. *See Welsh v. Wisconsin*, 466 U.S. 740, 753, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984), *citing Payton gen'ly* (exigent circumstances will not suffice to overcome the warrant requirement for minor offenses). *Welsh*, 466 U.S. at 752, cites with approval *People v. Sanders*, 59 Ill. App. 3d 6, 16 Ill. Dec. 437, 374 N.E.2d 1315 (1978): *Sanders* held that a burglary without weapons was not an offense grave enough to obviate the warrant requirement.

Refusing to take "no" for an answer, Wood attempts to bootstrap his desire to assist Blessard in finding his step-daughter into reasonable justification to search. No additional facts beyond those stated above exist to support a warrantless search of the Hunsberger home for A.W. Therefore, this excuse fails, too, because the facts do not demonstrate an imminent threat with regard to A.W. that would justify a warrantless search.

In finding the search reasonable, however, the panel sets a very low standard for reasonableness, a standard in conflict with *Whiteley v. Warden*, 401 U.S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971), and *U.S. v. Moses*, 540 F.3d 263 (4th Cir. 2008). *Moses* and *Whiteley* establish that an officer must have a reasonable belief equivalent to probable cause to justify a search without a warrant. *Moses*, 963 F.2d at 678; *Whiteley*, 401 U.S. at 566, *citing McCray v. Illinois*, 386 U.S. 300, 304-05, 87 S. Ct. 1056, 1058 1059, 18 L. Ed. 2d 62 (1967). "Probable cause to make an arrest exists where the facts and circumstances of which the arresting officer has knowledge would be sufficient to permit a reasonably prudent person to conclude that a crime has been, will be, or is being committed. *U.S. v. Laboy*, 909 F.2d 581, 585-86 (1st Cir. 1990), *citing Michigan v. De Fillippo*, 443 U.S. 31, 36, 99 S. Ct. 2627, 2631, 61 L. Ed. 2d 343 (1979), and *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 225, 13 L. Ed. 2d 142 (1964). "[P]robable cause means 'a fair probability that contraband or evidence of a crime will be found,'" *U.S. v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989), *quoting Illinois v. Gates*, 462 U.S.

213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527 (1983).

In other words, the facts known to the officer must create a reasonable belief that more likely than not an imminent emergency exists that requires immediate entry to abate. *See Kirk v. Louisiana*, 536 U.S. 635, 638 (2002), *citing Payton*, 445 U.S. at 590; *also see Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir. 1980); *Swint v. Wadley*, 51 F.3d 988, 998 (11th Cir. 1995), *cite omitted*; and *Fisher v. Volz*, 496 F.2d 333, 339-40 (3d Cir. 1974). Viewing the facts from an objectively reasonable perspective, as we are required to do (*Wilson*, 525 U.S. at 614, *quoting Anderson*, 483 U.S. at 639), leads to the conclusion that Wood lacked a reasonable belief that more likely than not an imminent emergency existed that required immediate entry to abate. Accordingly, neither the emergency nor the community caretaker exceptions apply and Wood violated the Hunsbergers' constitutional rights.

B. The law concerning the emergency and community caretaker exceptions was clearly established at the time of the violation.

The second question for qualified immunity purposes is whether "[t]he contours of the right [were] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987), *also see Wilson*, 526 U.S. at 614-15. The constitutional right at issue must be "clearly established in a

particularized and relevant sense. [But] [i]t is important not to be over-specific – there need not be a prior case directly on all fours with the facts presented to the official." *Pinder v. Johnson*, 54 F.3d 1169, 1173 (4th Cir. 1995), *citing Anderson*, 483 at 639, and *Beardsley v. Webb*, 30 F.3d 524, 530 (4th Cir. 1994).

The question applied by the Supreme Court in *Anderson* to ascertain the "actual constitutional right" (*Layne*, 526 U.S. at 609) at issue applies with equal force in this case: "whether a reasonable officer could have believed [Wood's] warrantless search to be lawful, in light of clearly established law and the information the searching officer[ ] possessed." *Anderson*, 483 U.S. at 641.

As discussed above, the home is given the utmost protection under the Fourth Amendment. Warrantless searches receive particular scrutiny, as well, because such searches "bypass[ ] a neutral predetermination of the scope of a search [and] leave[ ] individuals secure from Fourth Amendment violations only in the discretion of the police." *Saucier*, 389 U.S. at 358-59, *quoting Beck v. State of Ohio*, 379 U.S. 89, 97, 85 S. Ct. 223, 228, 13 L. Ed. 2d 142 (1964). *See also McDonald*, 335 U.S. at 455-56:

> Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. ... The right of privacy was deemed too precious to entrust to the discretion of those whose job is the

> detection of crime and the arrest of criminals. ... [H]istory shows that the police acting on their own cannot be trusted;

and *Minnesota v. Olson*, 493 U.S. 91, 95, 110 S. Ct. 1684, 109 L.Ed.2d 85 (1990).

The law to which Wood may be held as of February 3, 2007, was that:

1. The sanctity of the home is owed the utmost protection (*Payton*, 445 U.S. at 586);

2. Searches of homes without a warrant are presumptively unreasonable (*Id.*);

3. Exceptions to the warrant requirement are narrowly drawn and few (*Coolidge v. New Hampshire*, 403 U.S. 443, 455, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971); and

4. To be justified in entering a home under the emergency or community caretaker exceptions the officer must have an objectively reasonable belief, i.e., probable cause, that an imminent risk of harm to person or property exists (*United States v. Moss*, 963 F.2d 673, 678 (4th Cir.

> 1992); *U.S. v. Gillespie*, 332 F. Supp. 2d 927 (W.D. Va. 2004). *O'Donnell v. Brown*, 335 F.Supp.2d 787, 804-05 (W.D. Mich., 2004) (*cites omitted*) ("The mere possibility of danger is not enough." *citing Tenenbaum v. Williams*, 193 F.3d 581, 594 (2d Cir. 1999).).

The law cannot be clearer: absent probable cause to believe that an imminent risk of harm to person or property existed Wood had no basis to enter the Hunsberger home. In this case, probable cause of an imminent risk of harm did not exist. Therefore, Wood violated clearly established law of which an 18-year law enforcement veteran should have been well aware.

III. Under what circumstances is a civilian's presence during a warrantless home search violative of the Fourth Amendment where the panel decision approving of the civilian's presence conflicts with *Wilson v. Layne*, 526 U.S. 603, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)?

"Although the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative, *the amendment protects against such intrusion if the private party acted as an instrument or agent of the Government.*" *Skinner v. Railway Labor Executives Assoc.*, 489 U.S. 602, 614, 109 S. Ct. 1402, 103 L. Ed.

2d 639 (1989), *and cases cited therein, emphasis added. Also see, United States v. Price*, 383 U.S. 787, 794, 86 S. Ct. 1152, 16 L. Ed.2d 267 (1966), *emphasis added*:

> Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. *It is enough that he is a willful participant in joint activity with the State or its agents.*

"Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily *turns on the degree of the Government's participation in the private party's activities, ... a question that can only be resolved in light of all the circumstances." Id., quotes omitted, emphasis added. See also Goldstein v. Chestnut Ridge Vol. Fire*, 218 F.3d 337, 342 (4th Cir.), *cert. den'd* 121 S. Ct. 882, 121 S. Ct. 1096 (2001).

The Fourth Amendment is also violated if the third-party conducts a search independent of the purpose for which the police are present in the home but *with the express or implied consent of the police*, the police enable the third-party's access (*Buonocore v. Harris*, 65 F.3d 347, 359 (4th Cir. 1995)); or the third-party's presence "was not in aid of the execution of the warrant." (*Layne*, 526 U.S. at 614). This constitutional protection from the presence of

third-parties during a search by law enforcement was clearly established as of 1995, as the Fourth Circuit recognized in *Buonocore*, 65 F.3d at 356-57.

Wood stated at deposition that he did not invite Blessard into the Hunsberger home, and that he and Blessard did not conduct a coordinated search. But persons inside the home testified that the pair searched the home together and were communicating to effect the search (J.A. at 62, Deposition of Aaron Cooper; 284-85, Deposition of A.H.), J.H.'s testimony reveals that Wood and Blessard entered her bedroom together and attempted to pull the covers off her. J.A. at 1441-42, 1457. Further, Wood – the person in authority at the scene, did not prohibit Blessard from entering the home. Wood impliedly consented to Blessard's presence and participation in the search, and Blessard believed he had Wood's permission to accompany him into the home. Blessard's statement to a Roanoke Times reporter is telling: "It's a sad day in the United States when a concerned father can't look for his daughter *with the consent of the law.*" *See The Roanoke Times*, July 11, 2007 (*emphasis added*). In an affidavit submitted in support of his motion for summary judgment Blessard said, "While Sergeant Wood never invited or instructed me to enter the home, *the fact that Sergeant Wood did not order me to leave the house confirmed my belief that I was not violating any laws by entering the home and searching* for my missing step-daughter." *See* J.A. at 608, *emphasis added*. Therefore, it is apparent that Blessard believed he had Wood's permission to be present in the home to look for his step-daughter.

If Blessard was present to "directly aid in the execution of the warrant" (*Layne*, 526 U.S. at 611), then Blessard's presence would be justified only if Wood's search was justified under the Fourth Amendment. As discussed above, Wood's search was unconstitutional, and, if Blessard was aiding Wood, then he, too, violated the Hunsbergers' constitutional rights.

On the other hand, if Blessard's presence was with Wood's express or implied approval but was unrelated to the purpose of Wood's search, then the Hunsbergers' constitutional rights were violated. In *Layne*, this Court held that "it is a violation of the Fourth Amendment for police to bring ... third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant." *Layne*, 526 U.S. at 614. While Blessard's presence may have been expedient for Wood it was not necessary. He should have ordered Blessard to remain outside and await conclusion of the search to determine.

This case differs from cases where the presence of a third-party has been allowed during execution of a search warrant to identify tangible property. The 17-year-old A.W. was certainly capable of identifying herself to Wood, if she had been found. And if she was in some sort of danger then Wood's actions only made matters worse by subjecting another civilian to whatever danger may have been present, and/or by potentially injecting Blessard into a situation to which Wood had no way of knowing how he would react. To accept Wood's

suspicion of an imminent thereat of danger to person or property is to accept that Wood knowingly subjected Blessard to whatever threat may have been present in the home, and to subject whatever and whomever they encountered in the home to the reaction of Blessard. How would Blessard have reacted, for example, if they had found A.W. engaging in a consensual sex act, or were confronted with an armed intruder?

No reasonable justification existed for Blessard to enter the home and Wood violated the Hunsbergers' constitutional rights by permitting him to be present and assist in the search. As the Fourth circuit correctly concluded in the *Buoncore* matter, the emergency exception cannot legitimize "conduct that would constitute trespass were it not conducted under the guise of a search warrant." *Buonocore v. Harris*, 65 F.3d 347, 359 (4th Cir. 1995). Like *Wilson*, 526 U.S. at 611, Wood did not require Blessard's assistance to effectively conduct a search of the home.

CONCLUSION

The panel erroneously relied upon material facts in dispute to find that Wood did not violate the Hunsbergers' constitutional rights. The evidence in the light most favorable to the Husnbergers sufficiently alleges violation of a constitutional right clearly established at the time of the violation. Likewise, the presence of Blessard to assist in the search was unconstitutional. In the words of the four dissenting members of the Fourth Circuit, "The panel's holding works an injustice on the Hunsbergers and creates an unsupportable and unsound precedent." *Hunsberger*, 583 F.3d 219, 228 (4th Cir. 2009).

WHEREFORE, Mark and Cheryl Hunsberger pray that the Court would grant this Petition and reverse the judgment of the Fourth Circuit.

Respectfully Submitted,

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December 11, 2009

APPENDIX

[ENTERED: JUNE 29, 2009]

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MARK J. HUNSBERGER; CHERYL A. HUNSBERGER,

Plaintiffs-Appellees,

v.

J. A. WOOD, Deputy Sheriff,
Botetourt County Sheriff's Office, No. 08-1782

Defendant-Appellant,

and

WILLIAM W. BLESSARD; JOHN DOE,

Defendants.

Appeal from the United States District Court
for the Western District of Virginia, at Roanoke.
Samuel G. Wilson, District Judge.
(7:07-cv-00087-SGW-MFU)

Argued: May 15, 2009

Decided: June 29, 2009

Before WILKINSON and TRAXLER, Circuit Judges, and C. Arlen BEAM, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Reversed and remanded by published opinion. Judge Wilkinson wrote the opinion, in which Judge Traxler and Senior Judge Beam joined.

COUNSEL

ARGUED: Elizabeth Kay Dillon, GUYNN, MEMMER & DILLON, PC, Salem, Virginia, for Appellant. Melvin Edward Williams, GRIMES & WILLIAMS, PC, Roanoke, Virginia, for Appellees. **ON BRIEF:** Terry N. Grimes, GRIMES & WILLIAMS, PC, Roanoke, Virginia, for Appellees.

OPINION

WILKINSON, Circuit Judge:

Sergeant J. A. Wood appeals the district court's denial of qualified immunity in this civil suit arising out of Wood's warrantless entry into the plaintiffs' home. Because the objective circumstances confronted by defendant on the night in question suggested that plaintiffs' home was being vandalized and that a missing teenage girl was in the house and in need of assistance, the search was reasonable under the Fourth Amendment exigent circumstances doctrine. We thus reverse the judgment of the district court and grant the defendant qualified immunity in this case.

I.

At 10:17 p.m. on February 2, 2007, a woman named Charlene Klik called 911 to report suspicious activity near her home in Roanoke, which is located in Botetourt County, Virginia. Klik had noticed a number of cars coming and going from the home of her neighbors, Mark and Cheryl Hunsberger. Because the lights in the house were off and she had not seen her neighbors in a couple of days, Klik thought that the Hunsbergers might be on vacation. She saw teenagers getting in and out of the cars in front of the home and became concerned that vandalism or burglary might be taking place.

In response to Klik's 911 call, the Botetourt County Sheriff's Office dispatched Sergeant J. A. Wood and Deputy Sheriff Jody Edwards to the scene. After Edwards briefly spoke to Klik, the two officers observed the home and the surrounding area from their cars for several minutes. The officers saw that some of the lights were on in the house and two cars were parked in front. Seeing and hearing nothing suspicious, they left the scene at approximately 10:37 p.m.

Contrary to Klik's belief, Mark and Cheryl Hunsberger were at home that night, as were their three children: their son Zach, then eighteen years of age; their son LH, then sixteen; and their daughter JH, then ten.[1] Five friends of the two Hunsberger boys were present as well, including NW, a minor girl who was then sixteen. Between 9:00 and 9:30

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[1] As was done in the briefs, we have referred to persons under the age of 18 by initials only.

p.m., the Hunsbergers put JH to bed and then watched television in the garage until approximately 11:00 p.m., when they went to bed.

The teenage children and their friends, who had earlier been at another friend's house, arrived at the Hunsberger home in two cars around 9:00 p.m. The teenagers went to the basement, where they watched television and played card games. Some of them drank beer and vodka. While at the Hunsberger home, several of the teenagers came outside the house at various times to smoke cigarettes and to retrieve items from their cars.

At approximately 11:00 p.m., the mother of one of the friends drove to the house to pick up her daughter; she also gave NW a ride to another friend's home where NW's car was parked. NW then drove back to the Hunsberger home in her own vehicle. Around midnight, Zach and another boy, Aaron Cooper, briefly left to go purchase beer.

The earlier visit by Edwards and Wood had not allayed Klik's fears, and after seeing additional activity at the house she again called 911 at 12:10 a.m. Edwards and Wood again were dispatched to investigate. While sitting in his vehicle, Wood observed a young man come into the garage, turn on the lights, turn them off again, and reenter the house. Edwards spoke to Klik, who said she was worried about vandalism or burglary at the Hunsberger home, and Edwards relayed Klik's fears to Wood. The officers noticed that a third car, the one driven by NW, was now parked in front of the

Hunsberger home. All three cars partially blocked the road.

The officers decided to ask the occupants of the Hunsberger home to move their cars and avoid disturbing the neighbors. They each pulled their cars into the Hunsberger home's driveway, at which point they noticed the lights inside the house turn off. Edwards and Wood exited their vehicles, approached the house, and rang the home's doorbell twenty-five or thirty times. No one came to the door.

Plaintiffs say they never heard the doorbell. The Hunsberger boys and their friends, however, did notice the officers' arrival. When the officers approached the house, Zach and one of his friends, Matt Deane, exited the house through the garage and ran to another friend's home. LH went to his bedroom. NW and two of the other friends hid under the stairwell in the basement.

Walking back to their cars, the two officers noticed that the previously closed side door to the garage, which Zach and Matt Deane had just run through to avoid the officers, was now open. Wood stepped into the garage and knocked on the door inside that led into the house. No one answered. Edwards and Wood returned to their cars.

The officers decided to contact the dispatcher to identify the owners of the vehicles in front of the house using the cars' license plate information. The dispatcher routed calls to each of the car owners to Wood's cell phone. Wood spoke to several parents

including William Blessard, NW's stepfather. Each agreed to pick up his or her respective vehicle.

It struck Wood as suspicious that the occupants of the home had turned off the lights when the officers approached, had refused to answer the door, and had apparently fled the home. Given Klik's claim that the Hunsbergers might be out of town, Wood became concerned about the possibility of vandalism. Wood also took into consideration the fact that two weeks earlier a vacant house nearby had burned down as the apparent result of unauthorized use.

Blessard was the first parent to arrive. Blessard told Wood that NW was supposed to be sleeping over at a friend's house, and that he did not know why her car was at the home of the Hunsbergers, whom he did not know. Blessard called NW's cellphone several times, but she did not answer. He became worried for the welfare of his stepdaughter.

Wood suggested to Blessard that they see if anyone would come to the Hunsberger home's door if they rang the doorbell. Walking towards the front door, they passed the garage, when Wood heard something being knocked over. Wood stepped inside the garage and then heard the door that connected the garage to the house's basement shut and lock. Blessard followed Wood into the garage, walked down the steps to the basement door, knocked repeatedly, and shouted NW's name. No one came to the door, and Blessard's apprehensions rose.

Wood then approached the door inside the garage that opened into the first floor of the home. He discovered it was unlocked. The series of strange happenings had increased Wood's fears of vandalism as well as his concern for the welfare of Blessard's stepdaughter. At that point, Wood decided to enter the home. Wood proceeded into the kitchen area and loudly announced that he was from the sheriff's office and that anyone in the home who was hiding should reveal himself. Blessard followed Wood into the home.

The lights were off in the home. Using his flashlight, Wood searched the first floor of the home and found no one present. He then went downstairs to the basement and Blessard followed. The two men encountered no one in the basement, but noticed that the television was turned on and saw several cans of beer. Wood and Blessard came back upstairs. Wood made another sweep of the first floor, but again found no one present.

Wood then proceeded up to the second floor, on which there were four bedrooms. As Wood looked in the first bedroom, which was empty, Blessard joined him on the second floor. As Wood entered the next bedroom, a dog walked out of a closet. Wood approached the closet, in which he discovered LH sitting on the floor and wearing only his boxer shorts. Wood says that he asked LH where everyone else was, and that LH said "they are not here." Wood exited the room to check the next bedroom, and LH walked out of the closet and went downstairs.

Wood searched the third bedroom with his flashlight, while Blessard stood by the doorway. Wood discovered JH lying under the covers in bed. JH remembers waking up to someone pointing a flashlight around her room, and that, half-asleep, she told them to leave her alone. Mark Hunsberger and Cheryl Hunsberger say they heard JH scream, which caused them to wake up. LH also says he heard JH scream at some point, but Wood and Blessard do not recall her screaming. JH had the covers pulled over part of her face. Wood approached her bed and pulled the covers down to reveal her face. Wood asked Blessard if the girl was his stepdaughter, and Blessard said no.

Wood checked the rest of the room and then stepped back into the hallway. At that point Mark Hunsberger, having just woken up, exited his bedroom and encountered the two men. Hunsberger asked Wood why the men were in his house. Wood said that Blessard was looking for NW. Hunsberger said that they should all go downstairs. The three men went into the kitchen on the first floor, and Wood attempted to explain in more detail why he and Blessard had entered the home. Shortly thereafter, Cheryl Hunsberger joined them. She asked for Wood's name and for an explanation of his and Blessard's presence. Mark Hunsberger became very upset with the two men, ordered them to leave, and asked his wife to call the police. Wood and Blessard left the house. The search lasted in total ten or fifteen minutes.

A lieutenant from the Sheriff's office came to the home to take the Hunsbergers' complaint against Wood. After the lieutenant departed, Cheryl Hunsberger called Zach to determine where he was and what had happened. Zach told his mother that several friends, including NW, were hiding in the basement. Upon learning this, Mark Hunsberger went downstairs and discovered NW and two more of his sons' friends. Mark Hunsberger asked his wife to drive NW home immediately, because Blessard was "worried sick" about her. Cheryl Hunsberger dropped NW off at her home.

On February 22, 2007, the Hunsbergers filed the present action in the United States District Court for the Western District of Virginia. Their complaint, twice amended, named Blessard and Wood as defendants and sought money damages under 42 U.S.C. § 1983 and two state law causes of action. Only relevant here is the § 1983 claim against Wood; it alleged that Wood's entry into the Hunsberger home violated the Fourth Amendment's protection against unreasonable searches.

Wood moved for summary judgment. With respect to the § 1983 claim, he argued that the entry into the home was constitutional, and that even if it were not he was entitled to qualified immunity because he violated no bright-line constitutional rule. The district court concluded that Wood's search of the home was not justified by an emergency, and was therefore unreasonable, and further determined that the constitutional right at issue was clearly established. *Hunsberger v. Wood*, 564 F. Supp. 2d 559, 565-70 (W.D. Va. 2008). Accordingly, the district

court denied summary judgment. *Id.* at 570. Wood immediately appealed the district court's ruling. We have jurisdiction over this interlocutory appeal to resolve the purely legal question of whether defendant is entitled to qualified immunity. *Johnson v. Jones*, 515 U.S. 304, 313 (1995).

II.

Plaintiffs contend that defendant violated their Fourth Amendment rights when he entered their home without a warrant. Because plaintiffs seek money damages, they must overcome defendant's qualified immunity. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Defendant argues that under Fourth Amendment doctrine, his entry was reasonable under the circumstances and that, even if the entry was unreasonable, he did not violate clearly established federal law. In our review of these purely legal questions, we must reverse the district court's denial of qualified immunity if either of defendant's contentions is correct. As it is within our discretion to choose which of these questions to consider first, *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009), we begin by asking whether defendant's conduct violated any constitutional right.

A.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "At the very core" of this guarantee "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961). Indeed, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. U.S. Dist. Ct.*, 407 U.S. 297, 313 (1972). Thus, "[i]t is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980) (internal quotation marks omitted).

However, this presumption can be overcome. "[B]ecause the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). Two exceptions are relevant here.

First, under some circumstances, a police officer can search without a warrant while performing "community caretaking functions." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). In *Dombrowski*, the defendant, a Chicago police officer, was in an automobile accident in Wisconsin. Believing that Chicago policemen were required to carry their service revolvers at all times, local police officers searched the defendant's disabled and towed

car in order to find the revolver, as it was standard procedure in their department to remove weapons from vehicles in order "to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands." *Id.* at 443. Because the search was a result of a function "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute," it was permissible. *Id.* at 441. Although *Dombrowski* involved the search of a vehicle, some lower courts have relied on the community caretaking rationale in upholding warrantless searches of homes. *United States v. Quezada*, 448 F.3d 1005, 1007 (8th Cir. 2006); *United States v. Stafford*, 416 F.3d 1068, 1073 (9th Cir. 2005); *United States v. Rohrig*, 98 F.3d 1506, 1521-22 (6th Cir. 1996). *But see United States v. Bute*, 43 F.3d 531, 535 (10th Cir. 1994) (holding that community caretaking exception applies only to automobile searches); *United States v. Pichany*, 687 F.2d 204, 208-09 (7th Cir. 1982) (same).

Second, even when not performing a community caretaking function, a police officer may search a home without a warrant if, in an emergency, "'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 394 (1978) (quoting *McDonald v. United States*, 335 U.S. 451, 456 (1948)). For example, law enforcement officers in hot pursuit of a suspected felon may chase their quarry into a home without seeking judicial authorization. *Warden v. Hayden*, 387 U.S. 294 (1967). They may enter a dwelling to

prevent the imminent destruction of evidence. *Ker v. California*, 374 U.S. 23 (1963). Firefighters may enter a burning building to combat a blaze, and may remain for a reasonable time after the fire to investigate its cause and look for evidence of arson. *Michigan v. Tyler*, 436 U.S. 499 (1978). In each of these situations, "there is compelling need for official action and no time to secure a warrant," *id.* at 509, making a warrantless entry reasonable.

Sergeant Wood argues that his entry was justified under both the community caretaking and exigent circumstances doctrines. Analyzing defendant's claim requires us to parse the distinction between the two exceptions to the warrant requirement. The doctrines overlap conceptually. For example, although fire officials investigate arson, the main function they serve is the protection of persons and property, not the detection of crime; thus the *Tyler* exception to the warrant requirement could be justified under a community caretaking rationale, as well as under the exigent circumstances doctrine. Nonetheless, as a doctrinal matter, the two exceptions are not the same. The community caretaking doctrine requires a court to look at the *function* performed by a police officer, while the emergency exception requires an analysis of the *circumstances* to determine whether an emergency requiring immediate action existed. Thus, as the district court noted, the doctrines have different "intellectual underpinning[s]." *Hunsberger*, 564 F. Supp. 2d at 567.

The parties suggest that *Brigham City v. Stuart*, 547 U.S. 398 (2006), might collapse the distinction between the two doctrines. In upholding a warrantless home entry pursuant to a claimed exigency, the Court in *Stuart* made clear that in general "an action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*,'" support the action. *Id.* at 404 (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978). "The officer's subjective motivation is irrelevant." *Id. See also Whren v. United States*, 517 U.S. 806, 813 (1996). This holding initially seems in some tension with *Dombrowski*, which requires a court to determine whether a police officer was engaged in a function "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." 413 U.S. at 441. However, the Court in *Stuart* also made clear that "'an inquiry into *programmatic* purpose' is sometimes appropriate." 547 U.S. at 405 (quoting *Indianapolis v. Edmond*, 531 U.S. 32, 46 (2000)). We think the best reading of the relationship between the two exceptions is that when analyzing a search made as the result of a routine police procedure, such as the policy of locating weapons in towed cars in *Dombrowski*, the court should examine the programmatic purpose of the policy— whether it was animated by community caretaking considerations or by law enforcement concerns. But when the search in question was performed by a law enforcement officer responding to an emergency, and not as part of a standardized procedure, the exigent circumstances analysis and its accompanying objective standard should apply.

B.

Neither party has suggested that Wood, when he entered the Hunsberger home, was following a standard policy that could be classified as community caretaking under the analysis above. A programmatic basis for the officer's actions may exist, but it has not been presented to this court in a fashion that would bring the community caretaker function into play. What community caretaking involves and what boundaries upon it exist have simply not been explained to an extent that would allow us to uphold this warrantless entry based on that justification. This is not to diminish the caretaking function, which may in some cases be of real value to absent homeowners, but only to say that it is in no sense an open-ended grant of discretion that will justify a warrantless search whenever an officer can point to some interest unrelated to the detection of crime.

We must therefore analyze this entry and search under the exigent circumstances doctrine. In this inquiry, we ask whether the circumstances known to Wood would create an "objectively reasonable belief that an emergency existed that required immediate entry to render assistance or prevent harm to persons or property within." *United States v. Moss*, 963 F.2d 673, 678 (4th Cir. 1992). Plaintiffs argue that Wood violated the constitution when he entered the first floor of the Hunsberger home from the garage, so it is the circumstances at that time that are relevant to whether his entry was justified.

We believe that the objective circumstances at the time of Wood's entry would cause a reasonable officer to believe that there was an emergency requiring prompt entry. First, the circumstances indicated the strong possibility of an unauthorized intruder in the home. Klik, the Hunsbergers' neighbor, had said that she thought the Hunsbergers were out of town. There appeared to be someone inside the home who wished to avoid contact with the police; when the officers first arrived, someone in the house turned the lights off, and then later the open door in the garage suggested that someone had fled the home while the officers were at the front door. Three cars not belonging to the Hunsbergers were parked in front of the house. No one came to the front door when the officers rang the doorbell, and no one answered when Wood and Blessard knocked on the basement door repeatedly. Furthermore, a vacant home in the neighborhood had recently burned down as the apparent result of unauthorized use.

All of these facts gave rise to an objectively reasonable belief that vandalism might be taking place in the home. It is true that police officers need more than a slight suspicion that property is being harmed to justify a warrantless entry. For example, an open door alone does not create a reasonable belief that a burglary is taking place. *Bute*, 43 F.3d at 537-39. But here there were numerous indications to justify the belief that someone was in the Hunsberger home who was not supposed to be there.

Second, there was evidence that a minor girl was in the home, given that her car was parked in front of the house. The girl's stepfather said that she was not supposed to be at the home and was exceedingly concerned for her welfare, especially given that it was the middle of the night. In his deposition testimony, Mark Hunsberger recalled telling his wife that night that Blessard was "worried sick" about his stepdaughter NW. The fact that the girl was not answering her cellphone suggested the possibility that she was hurt or otherwise in need of assistance. When a child goes missing, time is of the essence. It turned out that NW was not in immediate danger, but we cannot judge Wood's search based on what we know in hindsight. At the time of the search, there was reason to think she needed help.

Under these circumstances, a reasonable officer could conclude that prompt entry was necessary in order to protect the Hunsberger home from potential damage and to locate a missing girl who might be in harm's way. This case thus differs from *United States v. Moss*, 963 F.2d 673 (4th Cir. 1992). There, we held that a forest service officer's search of a cabin that he believed to be illegally occupied was unreasonable where there was "no indication that any illegal occupant was inside" the cabin, "no immediate danger that the cabin itself would be damaged," and nothing suggesting "an emergency that required immediate identification of the occupants in order to give them assistance." *Id.* at 679. Here, the situation could not be more different. The combined exigencies made probable that there was a need for immediate entry, and

therefore the officer had an "objectively reasonable perception of an emergency." *Id.*

Plaintiffs argue that Wood should have asked the dispatcher for plaintiffs' home telephone number and attempted to call them before entering. Whether in retrospect this course of action might have been preferable is not dispositive: "[t]he fact that the protection of the public might, in the abstract, have been accomplished by less intrusive means does not, by itself, render the search unreasonable." *Dombrowski*, 413 U.S. at 447 (internal quotation marks omitted). Plaintiffs also suggest that Wood should have investigated neighbor Klik's credibility, given that her assertion about the Hunsbergers being on vacation was incorrect. But to accept arguments like these would be to put too great a burden on officers tasked with responding to emergencies. There is a danger that in the light of day we can forget that in emergencies, "the business of policemen and firemen is *to act*, not to speculate or meditate on whether the report is correct. . . . When policemen, firemen or other public officers are confronted with evidence which would lead a prudent and reasonable official to see a need to act to protect life or property, they are authorized to act on that information, even if ultimately found erroneous." *Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir. 1963) (Burger, J.).

Plaintiffs contend that even if the entry did not violate the Fourth Amendment, the scope of the search was unreason-able. Because Wood found no evidence of vandalism on the first floor, plaintiffs contend, he should not have descended to the

basement or gone up to the second floor. This argument is without merit. The fact that there was no evidence of vandalism in the main living area did not require the conclusion that all was well in the Hunsberger house. Vandals do not confine their search for valuables to downstairs rooms, nor do they rule the upstairs out of bounds for hiding or for inflicting serious harm on others they may happen upon in a house. It is not surprising, therefore, that plaintiffs do not point to precedent for the proposition they seek. Moreover, Wood did not locate the missing NW on the first floor, so that justification for his search remained. Nor did anything he saw on the first floor make clear who had been or remained in the house that night, and thus it was not unreasonable for him to continue searching in order to determine whether an unauthorized person was present. As soon as Wood realized that the Hunsbergers were at home, he ended his search and, after explaining to the homeowners why he had entered, left the house.

Finally, plaintiffs contend that the search was unreasonable because of the presence of Blessard. The parties dispute whether Wood consented to Blessard's presence or Blessard merely followed Wood into the house. Even accepting as true plaintiffs' contention that Wood consented to Blessard's presence, the search was not unreasonable. On this assumption, Blessard was present to help Wood identify NW, Blessard's missing stepdaughter. Thus, unlike *Wilson v. Layne*, 526 U.S. 603 (1999), where the Court held that the presence of reporters made the scope of a search pursuant to a search warrant unreasonable, here the

third party's presence was "related to the objectives of the authorized intrusion." *Id.* at 611. Plaintiffs argue that Wood could have asked Blessard to wait outside, and then, if he found a girl matching NW's description, bring her outside so that Blessard could identify her. But, again, simply because plaintiffs can point to a different way that Wood might have pursued his search does not mean that Wood's actual conduct was unreasonable. Wood was responding to a difficult, evolving, and uncertain situation, and he was attempting to prevent imminent harm to the Hunsbergers' property and to locate the missing NW. It would be reasonable to think that Blessard's presence in the house would be useful if NW were located.[2]

Because we conclude that defendant did not violate the Fourth Amendment, we need not proceed to ask whether the alleged right was clearly established. *Pearson*, 129 S. Ct. at 818. There is a significant overlap between a Fourth Amendment analysis and a qualified immunity inquiry; both are ultimately concerned with reasonableness. Wood's actions were reasonable and he therefore deserves immunity from money damages.

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[2] Nothing herein is intended to suggest that officers have free license to allow civilians into private homes during searches. Our holding as to Blessard's presence is governed by the specific facts before us, in which a minor girl was missing in the middle of the night, very possibly in the home and in need of assistance. The stepfather entered the home not to assist with any routine police work, but solely to help in identifying his stepdaughter and removing her from a potentially dangerous situation. To be reasonable, the presence of a third party during a search of a home must thus be "related to the justification for police entry," here the identification of a lost and possibly endangered child. *See Wilson*, 526 U.S. at 611.

III.

We do not discount the fear and surprise that plaintiffs no doubt experienced from an unwanted intrusion into their home. But to say that the whole situation was unfortunate is different from saying an officer was objectively unreasonable in acting as he did. To sum up, on the evening in question, the officer knew of two 911 calls from a neighbor complaining of noise and disturbances at the Hunsberger residence and the neighbor's view that the Hunsbergers were not at home. The officer personally observed suspicious behavior and furtive goings and comings upon his approach. In addition, the officer knew of a missing minor after the hour of midnight, observed the shaken stepfather worried about his stepdaughter's whereabouts, witnessed the stepfather's repeated inability to contact his stepdaughter notwithstanding the presence of her car outside the home, all in a neighborhood where a vacant house nearby had burned down only recently as the apparent result of unauthorized use. While it is tempting to second-guess an officer's actions, it is also true that real harm to persons and property could result "if police tried to act with the calm deliberation associated with the judicial process." *Wayne*, 318 F.2d at 212. Because defendant's response to the emergency he perceived was objectively reasonable, he is entitled to qualified immunity. The order denying defendant qualified immunity is reversed, and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED

[ENTERED: JUNE 29, 2009]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1782
(7:07-cv-00087-SGW-MFU)

MARK J. HUNSBERGER; CHERYL A. HUNSBERGER,

Plaintiffs – Appellees

v.

J. A. WOOD, Deputy Sheriff, Botetourt County Sheriff's Office,

Defendant – Appellant

and

WILLIAM W. BLESSARD; JOHN DOE,

Defendants

J U D G M E N T

In accordance with the decision of this Court, the judgment of the District Court is reversed. This

case is remanded to the District Court for further proceedings consistent with the Court's decision.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

[ENTERED JULY 3, 2008]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

MARK J. HUNSBERGER	)	
and	)	**Case No.**
CHERYL A. HUNSBERGER,	)	**7:07CV00087**
Plaintiffs,	)	
	)	**MEMORANDUM**
v.	)	**OPINION**
	)	
J.A. WOOD	)	**By: Samuel G.**
and	)	**Wilson**
WILLIAM W. BLESSARD,	)	**United States**
Defendants.	)	**District Judge**
	)	

This is an action for damages by plaintiffs Mark and Cheryl Hunsberger against defendants William W. Blessard and Botetourt County, Virginia Deputy Sheriff J.A. Wood arising out of their warrantless entry into the Hunsbergers' home. Plaintiffs assert three claims: a Fourth Amendment claim, pursuant to 42 U.S.C. § 1983; an unreasonable search and seizure claim, pursuant to Virginia Code § 19.2-59, against Wood only; and a trespass claim, pursuant to Virginia law. The matter is before the court on cross-motions for summary judgment. The Hunsbergers maintain that defendants' warrantless entry into their home violated the Fourth Amendment and state law. Wood maintains that his entry into the Hunsbergers' home was reasonable under the Fourth Amendment and

permissible under state law because he entered pursuant to the "caretaker" and "emergency" doctrines and that, in any event, he transgressed no bright constitutional line and is entitled to qualified immunity as to the Hunsbergers' § 1983 claim. Blessard maintains that he was not a state actor subject to liability under § 1983, that he is not liable under § 1983 because he acted in good faith, and that he is not liable for punitive damages as to the trespass claim. The court finds that, in the light most favorable to the Hunsbergers, there was not an apparent emergency justifying Wood's warrantless entry into the Hunsbergers' home under the emergency or caretaker doctrines. The court denies the Hunsbergers' and Wood's cross-motions for summary judgment. However, the court also finds that, even in the light most favorable to the Hunsbergers, Blessard entered their home in good faith and is not subject to liability under § 1983. Accordingly, the court will grant Blessard's motion for summary judgment on that claim. Previously, the court held that Blessard is not subject to liability under § 19.2-59 as a matter of law and therefore dismissed that claim. This leaves only a purely state law trespass claim against Blessard. Although the court is constrained to deny Blessard's motion for summary judgment as to this claim, it finds that he is not liable for punitive damages as to the trespass claim.

I

For the purposes of resolving Wood's and Blessard's motions for summary judgment the court

recites these facts in the light most favorable to the Hunsbergers.

Just after ten o'clock on the night of February 2, 2007, Sergeant J.A. Wood and Deputy Jody Edwards of the Botetourt County Sheriff's Office received a call from the dispatcher reporting a call from Charlene Klik, a neighbor of Mark and Cheryl Hunsberger, complaining of cars coming and going from the Hunsbergers' house, kids being dropped off, and loud noise. Wood understood that Klik did not know if the homeowners or parents were home and that Klik did not know what was going on, but that Klik believed that noise from the house was upsetting her dogs and that the cars parked at the house did not belong there. (Wood Dep. 92.) The officers parked outside of the house where they found two cars parked alongside the road in front of the house, the house lights on, no noise, and nothing at the scene that substantiated Klik's complaint of noise or suspicious activity. The two officers left approximately five minutes after arriving.

Two hours later, after midnight, the officers returned to the house because Klik had called again reporting further activity and noise. Edwards went to speak with Klik who repeated her complaint and stated that she was worried about the homeowners being gone. Again, Wood observed that the lights in the Hunsbergers' house were on but he heard no noise. Wood observed a young man enter the garage from the house, turn the garage light on, then shortly after, return to the house, turning the garage light off again. Wood also observed three cars parked alongside the road in front of the house, two cars

parked with two tires on the grass but one parked with its rear end farther out in the road than the other cars. The only difference at the scene from Wood's previous visit was one additional car parked outside the house.

When Edwards returned from talking with Klik, Wood told Edwards that they would go up to the house, "talk to the folks that are there, [and] get them to move the cars off of the street." (Wood Dep. 100.) Wood also said they would ask them to keep the noise down although he had still not heard any noise. (Wood Dep. 100.) Wood and Edwards pulled their cars into the Hunsbergers' driveway and up to the corner of the house. At that point, the lights in the house went out.

Wood approached the front door of the house while Edwards stood behind him in the front yard. Wood rang the doorbell a few times and waited a minute or so. When no one answered the door, Wood rang the bell continuously, twenty-five or thirty times. (Wood Dep. 107, Matthew Deane Dep. 37, AW[1] Dep. 87.) Wood and Edwards turned and began to walk to their cars when Wood noticed that the walk-in door on the side of the garage, which had been closed when the officers approached minutes before, was now open. Wood entered the garage and surveyed it with his flashlight, saw nothing out of the ordinary and exited. Wood then walked around to the back of the house to make sure that no one was hiding there. Wood observed two vehicles

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[1] Most of the parties' filings use initials to conceal the names of minors. The court follows suit here.

parked behind the garage and a trashbag containing beer cans in the yard.

Wood contacted the dispatcher to run a check on the license plates of the cars parked at the house. He learned that the two cars parked behind the garage belonged to the Hunsbergers. (Wood Dep. 113.) Wood asked the dispatcher to call the owners of any cars that did not belong to the homeowners and connect those calls to his cell phone. Wood spoke with Teresa Cooper and Jennifer Deane, two mothers of teenage boys who were at the house, as well as William Blessard, the stepfather of a teenage girl who was at the house. Wood informed the parents that their vehicles were at the house and parked in the road "a little bit" and asked if they could come and pick up their vehicles. (911 Tr. 15.) Wood informed Cooper that her son was "going to either be drunk or drinking" (911 Tr. 16) and told Deane "I can't get anybody to answer this door. I don't know what's going on here other than I'm pretty sure that everybody in there's going to have had something to drink and their [sic] probably not old enough if I'm right." (911 Tr. 24.)

Blessard arrived at the house before the other parents and Wood informed Blessard that he had received two noise complaints, that he did not think that the parents were home, that he did not know if it was a teenage party or not, and that he was still investigating. Blessard told Wood that his stepdaughter was supposed to be staying with a friend, not at the Hunsbergers' house, but that her car was parked out front and she was not answering her cell phone. While Blessard and the officers were

outside the house, two other cars pulled up to the house, people exited those cars and drove off in the cars parked in front of the house. Neither officer stopped anyone who arrived or left in order to ask if those people might clarify the situation.

Wood suggested that he and Blessard approach the house together to see if Blessard could get someone to come to the door so that they could find his step-daughter. As they approached the house, Wood and Blessard heard a noise in the garage. Wood and Blessard entered the garage through the walk-in door and heard the sound of one or more persons going down into the basement from the garage, then shutting and locking the door. Blessard went down the stairwell and knocked on the locked door, calling for his stepdaughter. Blessard knocked hard enough to loosen the door from the jamb slightly but he received no answer and returned to the garage.

Wood informed Edwards by radio that there was a "second unsecured door" (Wood. Dep. 137) leading into the house but did not use his radio to call for backup or contact deputy Edwards further, even though Wood's radio was switched on during the entire search of the house. Wood entered the main floor of the house through the door from the garage and announced himself. Blessard accompanied Wood either beside or just behind Wood. Wood did not tell Blessard to stay back or exit the house while he searched. In fact, the two men said nothing to one another as they entered the main floor.

The two men surveyed the main floor of the house using Wood's flashlight. They saw no one and heard nothing. Wood and Blessard then proceeded downstairs to a basement area (apparently separate from the basement area where Blessard had knocked earlier) where they saw a bar on which sat a beer carton, a few empty beer cans, and a half-full bottle of vodka. The television in that room was on, and the screen was blue as if someone had just turned off a video game. (Blessard Dep. 96-97.)

Wood and Blessard then went back to the main floor of the house, surveyed the rooms again, then went through a hallway and up the stairs to the second floor. Upstairs, Wood entered a bedroom and determined that it was empty while Blessard stood near the doorway. Wood then entered a second bedroom where a dog walked out of a closet. Wood opened the closet and found the Hunsbergers' sixteen-year old son, seated in the closet wearing only his boxer shorts. Wood asked him "where everyone else was" and the boy replied by asking "they're not here?" (Wood Dep. 160.) The boy then stood up and walked past Wood and Blessard, who asked him nothing more in order to clarify what was happening, and he walked downstairs and neither Wood nor Blessard saw him again.

Wood and Blessard then entered a third bedroom where they could see that someone was asleep in the bed whose hair was visible above the covers. Wood pulled the covers down to see who was in the bed and revealed the Hunsbergers' ten-year-old daughter. Wood asked Blessard if this was his stepdaughter and Blessard replied that it was not.

At that point, the girl in the bed screamed loudly enough for her father to hear in his bedroom further down the hall. (Mark Hunsberger Dep. 33.) Wood and Blessard exited the girl's room and approached the last bedroom when Mark Hunsburger exited that room (the Hunsbergers' bedroom) in a bathrobe and confronted Wood and Blessard. Mr. Hunsberger asked what was going on. Wood answered, "this man is looking for his daughter." Mr. Hunsberger responded "let's go downstairs," and the three men went downstairs into the kitchen.

In the kitchen, Mr. Hunsberger continued to ask what was going on. Blessard did not speak. Wood replied that he was looking for Blessard's daughter and that her car was parked in front of the house. Mr. Hunsberger replied that kids often meet up and drop off cars, that he had never seen Blessard's daughter before, and that he had no idea whether she was in his house. Wood then informed Mr. Hunsberger that he had found beer in the basement. (Mark Hunsberger Dep. 36.)

Mrs. Hunsberger, who was upset that her daughter awoke to two men in her room, then came down to the kitchen. Seeing his wife upset, Mr. Hunsberger became upset as well and told Mrs. Hunsberger to call the police and repeatedly told Wood and Blessard to leave the house. Wood and Blessard left through the garage approximately ten minutes after Mr. Hunsberger discovered them in his house. Wood and Blessard were in the house for between thirty and forty-five minutes in total.

After Wood and Blessard left, Mr. Hunsberger called the Botetourt County Sheriff's office to file a complaint against Wood. Lieutenant Blessard (no relation to defendant William Blessard) came to the house and made a report of the Hunsbergers' complaint.

II

Claims Against Wood

A. *The* § 1983 *Claim*

Wood maintains that his warrantless entry into the Hunsbergers' home was lawful under the emergency and community caretaker doctrines and that, even if it were not, he is entitled to qualified immunity. At this juncture, on Wood's and Blessard's motions for summary judgment, when the court is required to resolve all disputed facts in favor of the Hunsbergers, the court concludes that Wood has failed to demonstrate either that the exceptions to the warrant requirement upon which he relies apply or that he is entitled to qualified immunity. Accordingly, the court denies Wood's motion for summary judgment.

Qualified immunity shields government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). "The concern of the immunity inquiry is to acknowledge that reasonable mistakes

can be made as to the legal constraints on particular [government] conduct." Saucier v. Katz, 533 U.S. 194, 205 (2001). Thus, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986).

When a government official properly asserts qualified immunity, the threshold question that a court must answer is whether the facts, when viewed in the light most favorable to the plaintiff, show that the official's conduct violated a constitutional right. Saucier, 533 U.S. at 201. "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." Id. However, "if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established" - that is, "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Id. at 201, 202. With these precepts in mind, the court turns to the question of whether, in the light most favorable to the Hunsbergers, Wood's warrantless entry violated the Fourth Amendment.

The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357

(1967). Those exceptions are circumscribed most closely or narrowly when a home is the subject of the intrusion. It is there that the purposes and protections of the Fourth Amendment are at their zenith. United States v. U.S. Dist. Court, 407 U.S. 297, 313 (1972) ("physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed")."[P]rivate residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable." United States v. Karo, 468 U.S. 705, 714 (1984); see also Payton v. New York, 445 U.S. 573 (1980) ("The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home ...."). Therefore, a search inside a home without a warrant is "presumptively unreasonable." Payton 445 U.S. at 586. It follows that suspicion, no matter how strong or reasonable, cannot overcome the presumption. Rather, to overcome the presumption the proponent must demonstrate that his warrantless entry falls within an exception to the warrant requirement. Here, Wood contends that his entry was lawful under the emergency and community caretaker doctrines. Accordingly, the court turns to those doctrines.

The courts have recognized:

> that police may enter premises without warrants for such emergency purposes as aiding in fire-fighting, giving first aid to people in distress, protecting persons or property from threatened harm, and the like. The circumstances under which warrantless entries for such purposes can be made are exactly comparable to those which justify warrantless entries under the more commonly encountered 'exigencies.' Indeed, they are also frequently referred to as 'exigent circumstances.' This particular exigency is expressed as one of reasonably perceived 'emergency' requiring immediate entry as an incident to the service and protective functions of the police as opposed to, or as a complement to, their law enforcement functions. To invoke this so-called 'emergency doctrine,' the person making entry must have had an objectively reasonable belief that an emergency existed that required immediate entry to render assistance or prevent harm to persons or property within.

United States v. Moss, 963 F.2d 673, 678 (4th Cir. 1992).

In Cady v. Dombrowski, 413 U.S. 433 (1973), the Supreme Court first described police officers'

non-law-enforcement functions as "community caretaking functions" in a case involving the warrantless search of an automobile. It noted that "local police officers ... frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as "community caretaking" functions, totally divorced from detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Id. at 441. The "community caretaker" doctrine has since emerged as a recognized exception to the warrant requirement. The community caretaker doctrine frequently intersects the emergency doctrine but its intellectual underpinning differs. Although an emergency may supply the occasion for a police officer to exercise his "community caretaker" functions or responsibilities, that is not necessarily the case. For example, in South Dakota v. Oppermann, 428 U.S. 364 (1976), the Supreme Court determined that the routine police practice of securing and inventorying impounded vehicles as a "community caretaking" function is reasonable under the Fourth Amendment despite the absence of an emergency or even probable cause. But in sanctioning the practice, the court noted that it drew a sharp dividing line between automobiles and homes or offices:

> This Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment. Although automobiles are "effects" and thus within the reach of the Fourth Amendment, warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not....Cady v. Dombrowski, 413 U.S. at 433,439-40.

Oppermann, 428 U.S. at 367. In the present case, Wood cites Cady v. Dombrowski as support for application of the "community caretaker" doctrine to support his warrantless entry. However, in Opperman the Supreme Court cites that very case and two others as examples of "warrantless examinations of automobiles [being] upheld in circumstances in which a search of a home or office would not." This does not mean that the "community caretaker" doctrine has no application to the warrantless entry of a home. Indeed, numerous state and federal courts have so applied it. See, e.g., United States v. Stafford, 416 F.3d 1068 (9th Cir. 2005) (applying community caretaker principles and Dombrowski to entry of residence, and finding that report of a dead body justified warrantless entry); United States v. McGough, 412 F.3d 1232, 1239 (11th Cir. 2005) (assuming arguendo that community caretaking applied to warrantless entry of home, and finding no exigent circumstances to justify entry); United States v. Meixner, 128 F. Supp. 2d 1070 (E.D. Mich. 2001) (applying community caretaker principles to entry of

residence, and finding that suspicion of a domestic dispute did not justify warrantless entry); State v. Smith, 97 P.3d 567,571 (Mont. 2004) (applying community caretaker principles to entry to an apartment bathroom, and finding that circumstances did not show need of immediate assistance, so entry was not justified). Rather, it reiterates something that the Fourth Circuit and other courts have made clear: the doctrine applies to homes only when the caretaking function is coupled with an emergency sufficient to satisfy the emergency doctrine. "[A]ny person making entry must have had an objectively reasonable belief that an emergency existed that required immediate entry to render assistance or prevent harm to persons or property within," Moss, 963 F.2d at 678, and if the officer's findings inside the home dispel the reasonable belief that there is an emergency, the Fourth Amendment intrusion must come to an end. Id. ("[W]arrantless entry for emergency reasons ... cannot be used as the occasion for a general voyage of discovery unrelated to the purpose of the entry."). Therefore, the question here is whether Wood had an objectively reasonable belief that an emergency existed that required immediate entry into the Hunsbergers' home to render assistance or prevent harm to persons or property within and, even if the original entry was justified, whether he continued the search after it should have been apparent that an emergency did not in fact exist. In answering that question, the Supreme Court has made clear that the Fourth Amendment inquiry is an objective one: "[a]n action is reasonable under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances viewed *objectively*, justify the

action.'....The officer's subjective motivation is irrelevant." Brigham City v. Stewart, 547 U.S. 398, 404 (2006) (emphasis in original).

Viewing the facts in the light most favorable to the Hunsbergers with the above precepts in mind, the court concludes that even if Wood's initial entry could be viewed as objectively reasonable, his findings once inside, at least before he entered the bedroom of the Hunsbergers' daughter and probably before, should have dispelled any reasonable belief that an emergency, in fact, existed justifying further intrusion.[2] Therefore, accepting the facts in the light most favorable to the Hunsbergers, the court concludes that Wood's warrantless excursion into the

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[2] It is clear from the recording of Wood's conversation with the mothers of the teenagers, Cooper and Deane, that Wood simply suspected (and correctly so) that the Hunsbergers' home was the scene of an underage drinking party. There is little else to suggest from the calls, or from his other actions, that he suspected anything else. Although "[a]n action is reasonable under the Fourth Amendment regardless of the individual officers state of mind, 'as long as the circumstances, viewed objectively justify [the] action'." Brigham City v. Stuart, 547 U.S. 398, 404 (2006). Wood's subjective belief, based as it was on objective evidence, lends some support for the proposition that a reasonable officer under the circumstances would have concluded that the Hunsbergers' home was simply the scene of an underage drinking party. If the court were to find otherwise, the court would be finding that Wood's subjective belief was unreasonable, and that which he did not believe (that something more pernicious was afoot) would have been a more reasonable belief.

Hunsbergers' home exceeded the scope of the emergency and community caretaker doctrines and, therefore, was impermissible.[3]

Having determined that a violation could be made out on a favorable view of the parties' submissions, the court turns to the next sequential step of the qualified immunity analysis and answers the question of whether the right was clearly established. At this step the court must determine whether the right alleged to have been violated was a "clearly established ... right [] of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The inquiry is an objective one, dependent not on the subjective beliefs of the particular officer at the scene, but

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[3] In his motion for summary judgment, Wood cites a number of cases in which courts upheld warrantless entry into homes by officers. In each of these cases, whether the court applied the emergency doctrine, caretaker doctrine, or both, exigent circumstances existed which required warrantless entry. See United States v. Gwinn, 219 F.3d 326 (4th Cir. 2000) (officer briefly re-entered a home to retrieve shoes and clothing for arrested suspect who was shoeless in a rural area); United States v. Gillenwaters, 890 F.2d 679 (4th Cir. 1989) (officers entered a house to aid a stabbing victim because a stabbing had been reported at that house); United States v. Dart, 747 F.2d 263 (4th Cir. 1984) (a lock sawed off of a storage unit evidenced violence to the property warranting inspection of the unit); Phillips v. Peddle 7 F. App'x. 175 (4th Cir. 2001) (officer entered home to check on threatened government witness who did not answer the door); United States v. Porter, 288 F. Supp. 2d 716 (W.D. Va. 2003) (officers entered in response to a security alarm in a home where no one responded to knocking). These warrantless entries were constitutional only insofar as they were required by the exigent circumstances. Here, in the light most favorable to the Hunsbergers, no similar exigencies required the extensive intrusion of Wood's search.

instead on what a hypothetical, reasonable officer would have thought in those circumstances. Milstead v. Kibler, 243 F.3d 157, 161 (4th Cir. 2001). "In determining whether a right was clearly established at the time of the claimed violation, 'courts in this circuit [ordinarily] need not look beyond the decisions of the Supreme Court, [the Fourth Circuit], and the highest court of the state in which the case arose '" Edwards v. City of Goldsboro, 178 F.3d 231, 251 (4th Cir.1999) (quoting Jean v. Collins, 155 F.3d 701, 709 (4th Cir. 1998) (en banc)). The court must conduct the clearly established analysis "at a high level of particularity," Edwards, 178 F.3d at 251, but "the nonexistence of a case holding the defendant's identical conduct to be unlawful does not prevent denial of qualified immunity," id., because "qualified immunity was never intended to relieve government officials from the responsibility of applying familiar legal principles to new situations." Trulock v. Freeh, 275 F.3d 391, 409 (4th Cir. 2001); see also Wilson v Layne, 526 U.S. 603, 615 (1999) (holding that a right can be deemed clearly established even if there is no prior decision addressing the precise conduct at issue, so long as its
illegality would have been evident to a reasonable officer on basis of existing caselaw). Thus, "'clearly established' in this context includes not only already specifically adjudicated rights, but those manifestly included within more general applications of the core constitutional principle involved." Pritchett v. Alford, 973 F.2d 307,314 (4th Cir. 1992).

It is axiomatic that the exceptions to the warrant requirement are circumscribed most closely or narrowly when a home is the subject of the

intrusion, because it is there that the purposes and protections of the Fourth Amendment are at their zenith. It is clearly established that "to invoke [the] so-called 'emergency doctrine,' the person making injury must have had an objectively reasonable belief that an emergency existed that required immediate entry to render assistance or prevent harm to persons or property within." Moss, 963 F.2d at 678. It would be neither helpful nor possible to catalog emergencies, but the cases make clear that there must be an imminent threat of serious harm, Brigham City, 547 U.S. 398 (From the backyard of a house, police observe, through a window, a fight break out inside the house where a person is punched so hard that blood sprays; this serves as exigent circumstances justifying a warrantless entry into the house); Michigan v. Tyler, 436 U.S. 499 (1942) (entry by officials to fight a fire requires no warrant); Mora v. City of Gaithersburg, 519 F.3d 216, 226 (4th Cir. 2008) (possibility of a bomb suffices as exigent circumstance permitting a warrantless search); United States v. Buckmaster, 485 F.3d 873 (6th Cir. 2007) (post-fire flooding in home created danger of electrical and structural damage, justifying warrantless entry); United States v. Uscanga-Ramirez, 475 F.3d 1024 (8th Cir. 2007) (exigent circumstances found where man locks himself in bedroom with a gun and is reportedly very upset over disintegration of marriage); United States v. Roberts, 166 F. App'x 80, 83 (4th Cir. 2006) (gunshot victim in the road and trail of blood leading into a house among the circumstances justifying warrantless entry); United States v. Kempf, 400 F.3d 501, 503 (7th Cir. 2005) (requiring objective belief that circumstances require "immediate action"), and

a reasonable officer would understand that suspicion that an underage person may be drinking or attending a social occasion in another's home where others are drinking, absent other circumstances, is not an immediate threat of serious harm that permits that officer to dispense with the warrant requirement.

Accordingly, the court finds that, when the facts are viewed favorably to the Hunsbergers, Wood has not shown that any exception to the warrant requirement applies. That is, if those facts are true, a Fourth Amendment violation occurred, and the right violated was clearly established. Therefore, qualified immunity does not apply, and the court denies Wood's motion for summary judgment.

B. *The State Law Claims*

Wood maintains that the Hunsbergers cannot prevail on their state law claims for violation of Virginia Code § 19.2-59[4] and common law trespass because his search of their home was lawful under

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[4] Virginia Code § 19.2-59 states in pertinent part:
No officer of the law or any other person shall search any place, thing or person, except by virtue of and under a warrant issued by a proper officer. Any officer or other person searching any place, thing or person otherwise than by virtue of and under a search warrant, shall be guilty of malfeasance in office. Any officer or person violating the provisions of this section shall be liable to any person aggrieved thereby in both compensatory and punitive damages. Any officer found guilty of a second offense under this section shall, upon conviction thereof, immediately forfeit his office, and such finding shall be deemed to create a vacancy in such office to be filled according to law.

the Fourth Amendment, and to the extent the Hunsbergers' claims are based on negligence, he is entitled to sovereign immunity. The court agrees that the Hunsbergers cannot prevail on their state law claims if Wood's search was lawful under the Fourth Amendment because § 19.2-59 provides no "greater restrictions on warrantless searches than required under the Fourth Amendment," Thims v. Commonwealth, 235 S.E.2d 443, 448 (Va. 1977), and a police officer's entry that is consistent with the Fourth Amendment is not a common law trespass. McClannan v. Chaplain, 116 S.E. 495 (Va. 1923) ("the only entry by officers which is held ... to be unlawful is that which occurs when the officers are making an 'unreasonable' search or seizure. Such a search or seizure is forbidden by the common law, and by the Fourth Amendment...."). But the lawfulness of Wood's search remains to be determined, and the court does not decide at this juncture whether sovereign immunity protects him because, in Virginia, when an agent has sovereign immunity he "is not immunized from suit. Rather, the degree of negligence which must be shown to impose liability is elevated from simple to gross negligence." Couplin v. Paine, 623 S.E.2d 592, 595 (Va. 2005).

III

Claims Against Blessard

A. *The* § 1983 *Claim*

The Hunsbergers seek to hold Blessard liable under § 1983, as well. Blessard asserts that he, as a

private citizen not acting in concert with a government official, is not a state actor and is therefore outside the scope of § 1983. He also argues that he is entitled to summary judgment because he acted without malice and in good faith that his conduct was lawful. The court finds it unnecessary to reach the question of whether Blessard acted in concert with Wood to such an extent that he may be liable as a state actor, because the court finds no material issue of fact as to whether he acted in good faith, which the court holds is a defense for a private party to a § 1983 claim.[5]

A government party may avoid liability by asserting qualified immunity, but private parties do not have qualified immunity. Wyatt v. Cole, 504 U.S. 158, 168 (1992). However, the Supreme Court of the United States has explicitly left open the question of whether private parties may assert a good faith defense in this context, Richardson v. McKnight, 521 U.S. 399, 413-14 (1997), and several courts of appeals have concluded that private parties do have such a defense. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250 (3d Cir. 1994); Wyatt v. Cole, 994 F.2d 1113, 1120 (5th Cir. 1993), *cert. denied*, 510 U.S. 977 (1993); Duncan v. Peck, 844 F.2d 1261 (6th Cir. 1988). In Wyatt v. Cole, 994 F.2d at 1120, the Fifth Circuit defined the scope of the defense by

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[5] Ordinarily private persons such as Blessard do not act "under color of" law within the meaning of § 1983. However, when there is a sufficient nexus between a private party and a government party, the private party may be subject to § 1983 liability. Wyatt v. Cole, 504 U.S. 158 (1992) (reaffirming that private individuals may sometimes be subject to § 1983 liability). See, e.g., Roche v. John Hancock Mut. Life Ins. Co., 81 F.3d 249 (1st Cir. 1996).

holding that "private defendants should not be held liable under § 1983 absent a showing of malice and evidence that they either knew or should have known" that their conduct violated the Constitution. Wyatt, 994 F.2d at 1120; but see Beerman, Why Do Plaintiffs Sue Private Parties Under Section 1983, 26 Cardozo L. Rev. (Symposium) 9 (2004) ("If private individuals violate constitutional rights under color of law, the courts have no basis for creating a defense to liability, whether it is the qualified immunity that government defendants receive or some new similar good faith defense."). Other courts have required a showing of malice *or* a knowing violation of the law. See, e.g., Benn v. Universal Health Systems, Inc., 2001 WL 1251207 (E.D.Pa. 2001). In Jordan, 20 F.3d at 1276, the Third Circuit found that malice in this context means a "subjective appreciation" that the conduct is unconstitutional. This court follows those courts that have found good faith to be a defense for private parties unless those parties act with malice or those parties knew or should have know their actions violated the Constitution.

The court finds no genuine dispute that Blessard acted without malice. The facts, even in a light most favorable to the Hunsbergers, demonstrate that Blessard was motivated solely by his desire to locate his stepdaughter. Blessard did not know the Hunsbergers (Blessard Dep. 58, 61), and his stepdaughter was not supposed to be at their home (Blessard Dep. 52). Blessard was unable to reach his stepdaughter on her cell phone, despite repeated attempts. (Blessard Dep. 59-60). Wood described Blessard as a "concerned parent" (Wood

Dep. 126), and Mark Hunsberger described Blessard as "worried sick" about his stepdaughter (Mark Hunsberger Dep. 46). In his deposition Blessard said of his state of mind that night:

> I just don't understand. I don't know if I'm the only one in the dark here. I mean, I just don't understand it.
> Thoughts are starting to go through my mind now. The Police aren't really telling me anything. The cars are disappearing. My daughter is missing and nobody knows a daggone thing about it.
> You know, I'm just at a loss here.

(Blessard Dep. 67.) It is clear that Blessard's sole purpose in entering was to locate his stepdaughter.

There is also no evidence to suggest that Blessard knew or should have known that his conduct violated the Constitution. He had little of the inside information that suggested that the Hunsbergers' home was simply the scene of an underage drinking party when he arrived and Wood suggested that the two of them approach the home to find Blessard's stepdaughter (Wood Dep. 125), and he entered the home only after Wood had done so. Wood - at least tacitly, but nonetheless clearly - led the way inside as the two men conducted the search through the house. Wood's actions supported Blessard's belief that he was not violating any law in entering.

The Hunsbergers assert that because the issue is a subjective state of mind, Blessard's good faith is almost a *per se* jury issue. It is true that "where state of mind is at issue, summary disposition should be sparingly used," Denny v. Seaboard Lacquer, Inc., 487 F.2d 485, 491 (4th Cir. 1973), and it is also true that direct observation of demeanor is often appropriate where credibility of witnesses is at issue. Morrison v. Nissan Co., Ltd., 601 F.2d 139, 141 (4th Cir. 1979). However, there still must be some fact from which the trier of fact reasonably could infer some other state of mind. See Conrad v. Delta Air Lines, Inc., 494 F.2d 914, 918 (7th Cir. 1974). Even the Hunsbergers recognize that "it is apparent that Blessard believed he had Wood's permission to be present in the home to look for his step-daughter." (PI.' s Mem. in Supp. of Summ. J. 22.) Even in the light most favorable to the Hunsbergers, nothing remotely suggests that Blessard acted with malice or that Blessard knew or should have known his actions violated the Constitution. Therefore, the court finds that Blessard acted in good faith and grants his motion for summary judgment as to the Hunsbergers' § 1983 claim.[6]

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[6] This case is before the court on cross motions for summary judgment. Thus far, the court has considered Wood and Blessard's motions for summary judgment taking the facts of the case in the light most favorable to the Hunsbergers. Taking the facts in the light most favorable to Wood and Blessard, the court finds that there are material questions of fact for a jury to decide and denies the Hunsbergers' motion for summary judgment.

B. *The Trespass Claim*

Finally, a state-law trespass claim remains pending against Blessard. Blessard moves for summary judgment of the Hunsbergers' claim for punitive damages[7], arguing that punitive damages are not appropriate because there is no evidence that Blessard acted in conscious disregard of the rights of others. In a common-law trespass suit in Virginia, "[p]unitive damages... may be recovered 'only where there is misconduct or actual malice, or such recklessness or negligence as to evince a conscious disregard of the rights of others.'" Hamilton Dev. Co. v. Broad Rock Club, Inc., 445 S.E.2d 140 (Va. 1994) (quoting Giant of Va., Inc. v. Pigg, 152 S.E.2d 271, 277 (Va. 1967). Here, the court already has found that Blessard acted neither with malice nor in conscious disregard of the law. Those findings apply with equal force to the Hunsbergers' trespass claim. Therefore, the court grants Blessard's motion for summary judgment as to their claim for punitive damages as to that claim.[8]

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[7] The court construes Blessard's motion to dismiss this claim as a motion for summary judgment, given the factual material submitted in support of the motion.

[8] Essentially, there is no fault element in an action for trespass to land (trespass *quare clausum fregit*). See Cooper v. Hom, 448 S.E.2d 403, 407 (Va. 1994). Any *unauthorized* entry onto property which results in interference with a property owner's possessory interest is actionable. Id. However, the Hunsbergers are not entitled to recover punitive damages from Blessard, and it is difficult to conceptualize, even in the light most favorable to the Hunsbergers on the fairly extensive record before the court, a recovery of anything except nominal damages.

IV

For the reasons stated, the court **DENIES** Wood's motion for summary judgment, **DENIES** the Hunsbergers' motion for summary judgment, and **GRANTS** Blessard's motion for summary judgment as to the Hunsbergers' § 1983 claim and their claim for punitive damages as to the trespass claim.

Entered: This 3rd day of July, 2008.

/s/ United States District Judge
UNITED STATES DISTRICT JUDGE

[ENTERED: JULY 3, 2008]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

MARK J. HUNSBERGER	)	
and	)	**Case No.**
CHERYL A. HUNSBERGER,	)	**7:07CV00087**
Plaintiffs,	)	
	)	**ORDER**
v.	)	
	)	
J.A. WOOD	)	**By: Samuel G.**
and	)	**Wilson**
WILLIAM W. BLESSARD,	)	**United States**
Defendants.	)	**District Judge**
	)	

In accordance with the memorandum opinion entered this day, it is hereby **ORDERED** and **ADJUDGED** that Wood's motion for summary judgment is **DENIED**, the Hunsbergers' motion for summary judgment is **DENIED**, and Blessard's motion for summary judgment is **GRANTED** as to the Hunsbergers' § 1983 claim and their claim for punitive damages as to the trespass claim. The case will be scheduled for trial.

Entered: This 3rd day of July, 2008.

/s/
UNITED STATES DISTRICT JUDGE

[ENTERED: SEPTEMBER 14, 2009]

PUBLISHED

Filed: September 14, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1782
(7:07-cv-00087-SGW-MFU)

MARK J. HUNSBERGER;
CHERYL A. HUNSBERGER,
Plaintiffs – Appellees,

v.

J. A. WOOD, Deputy Sheriff, Botetourt County Sheriff's Office,
Defendant – Appellant,

and

WILLIAM W. BLESSARD; JOHN DOE,
Defendants.

ORDER

In a poll requested by a member of the court on the petition for rehearing en banc, Judges Michael, Motz, King, and Gregory voted to rehear

the case en banc. Chief Judge Traxler and Judges Wilkinson, Niemeyer, Shedd, and Duncan voted to deny rehearing en banc. Judge Agee did not participate in the decision of this case. As a majority of participating judges has voted against rehearing en banc and as the panel has voted to deny rehearing, the petition for rehearing and rehearing en banc is hereby denied.

Judge Wilkinson wrote an opinion concurring in the denial of rehearing en banc. Judge Motz wrote an opinion dissenting from the denial of rehearing en banc.

Entered for the court at the direction of Judge Wilkinson.

For the Court

/s/ Patricia S. Connor
Clerk

WILKINSON, Circuit Judge, concurring in the denial of rehearing en banc:

I appreciate the views of my dissenting colleague and add only these words to the panel opinion. Hunsberger v. Wood, 570 F.3d 546 (4th Cir. 2009). I believe the panel's judgment to be quite correct and fully consistent with the Supreme Court's often repeated objective of not subjecting officers making difficult discretionary judgments to monetary liability and retrospective relief. See Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982); Cloaninger v. McDevitt, 555 F.3d 324, 331 (4th Cir.

2009). The cases reiterating this principle are well-known and too numerous to mention, and the almost unparalleled frequency of the principle's iteration by the Court attests not only to its importance to law enforcement but also to its extension of simple fairness to officers who cannot be said to be liable for actions that are found unlawful only by courts splitting hairs in hindsight. See, e.g., Pearson v. Callahan, 129 S.Ct. 808, 815 (2009); Saucier v. Katz, 533 U.S. 194, 202 (2001); Hunter v. Bryant, 502 U.S. 224, 227 (1991); Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

Whatever the prong of the Pearson inquiry, the ultimate touchstone is one of objective reasonableness. Multiple objective indicators made the officer's judgment a reasonable one here. The presence of Mr. Blessard in plaintiffs' home was solely to aid the officer in finding Blessard's lost and quite possibly endangered stepchild. JA 404, 407. A teenage girl was missing after midnight. JA 1176-77. She was not where she was supposed to be. JA 363, 368-69, 1308. She did not respond to any of her stepfather's repeated attempts to reach her by cell phone. JA 385, 547. Her stepfather was by all accounts, even the plaintiffs', "worried sick" about his stepdaughter. JA 966, 607, 383. The child's car was parked outside the home of plaintiff (a stranger), blocking the road. JA 369, 1279-80. A home in the immediate neighborhood had recently burned down as the apparent result of unauthorized use. JA 1315-16. There had been two 911 calls about activity at the Hunsberger home. JA 911, 915. A neighbor informed the officers that the Hunsbergers were on vacation. JA 231, 1269. As the officers

approached the home, two people fled the darkened premises. JA 149-50. The two officers indicated independently that upon their approach, lights turned off, JA 1284, 1413, and despite repeated rings of the doorbell, no one answered the door, JA 1121, 1176, 1290-91, 1422-23.

While plaintiffs attempt to create a disputed issue of fact as to this last sentence, they do not dispute that two people fled the premises upon the officers' approach. JA 149-50. Nor do they dispute the reasonableness of Sergeant Wood's overall perception that there was suspicious behavior at the Hunsberger home, that whoever was inside desperately wished to avoid contact with the police, and that the officer heard strange noises in the garage and a basement door shut and lock upon his approach. JA 1309, 1176-77. However one tries to slice and dice it, any objectively reasonable officer would have been concerned not only for the safety of the Hunsbergers' property but for the safety of the occupants inside.

Now of course in a situation that unfolded as rapidly as this one did, there will invariably be points of disputed recollection. In fact, the remarkable thing about this case is how little is in dispute, given the run of cases that we have seen where material matters were genuinely at issue. To find liability under these circumstances would simply deal a heavy blow to the capacity of law enforcement to protect persons and property in situations where perfectly reasonable people would perceive them to be at real risk. Where protective police activity even to ensure human safety carries

heavy monetary consequences and a failure to act carries no penalty at all, see DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989), it is not difficult to predict that the incentives for inaction will at some point discourage even the most sensible and prudent protective steps.

I repeat that the officer here confronted two different, mutually-reinforcing situations -- the need to prevent vandalism and to locate a missing girl before she was seriously harmed. By the time the officer filled out a warrant affidavit and tried to rustle up a magistrate in the wee hours of the morning, it may well have been too late. If we were to hold the officer liable for damages in this situation, we would go far to establishing a broad rule that would prevent police from taking even the most reasonable steps to prevent serious damage to absent homeowners' property and to locate missing minors who might be in situations beyond their capacity to cope.

Plaintiffs seem to suggest that the Fourth Amendment requires a flat rule against the presence of civilians in a home during an officer's search. But a flat rule is not consistent with the reasoning of Wilson v. Layne, 526 U.S. 603 (1999). Wilson did not establish a blanket rule against the presence of civilians during searches; instead, it made clear that courts must undertake case-by-case inquiries into whether a third party's presence is "related to the objectives of the authorized intrusion." Id. at 611. This is far from a flat rule against the presence of civilians, and it is unclear how plaintiffs derive the principle for which they argue.

The flaws of a per se rule against third-party entries become evident when one considers how it would apply in practice. There are innumerable situations where during a home entry an emergency might require the presence of a person who is not a police officer. Firefighters must enter a home to battle a blaze. Michigan v. Tyler, 436 U.S. 499 (1978). Someone who is a doctor or nurse or a lay person who knows how to administer first-aid might provide critical medical services to persons injured in their homes. Explosive experts must enter dwellings to identify and disarm dangerous bombs. Police officers often need property owners to identify their belongings to determine whether they have been stolen. See, e.g., Bellville v. Town of Northboro, 375 F.3d 25, 33 (1st Cir. 2004). Bystanders or neighbors sometimes need to assist officers in identifying a victim. Someone who speaks Spanish or any number of languages might be required to translate during the search of a home of someone who does not speak English. These situations are absolutely legion, and cannot all be resolved by some flat rule in advance. Instead, courts must deal with them on a case-by-case basis, evaluating the justification for the presence of the third party in light of the reason for the entry. A per se rule would effectively overrule the Wilson case and would prevent police officers from seeking critical help from civilians during searches. In fact, the panel explicitly adopted a narrow holding, tied closely to the facts, to be elaborated only as specific cases and circumstances arise.

The facts which I have recounted above in this case would certainly have suggested to an objectively reasonable officer that this teenage girl was not only missing but possibly hurt and incapacitated. Not to belabor the point, but any parent whose daughter was out after midnight, not answering her cell phone, in a house where she was not supposed to be, in a neighborhood where another residence had only recently burned down, with her car blocking the road, etc. would be alarmed, as plaintiffs admit Blessard was. And any reasonable officer would have tried to help. Even adopting plaintiffs' view that Wood expressly consented to Blessard's presence, as the panel's opinion explicitly did, Wood acted reasonably. It was reasonable for Wood to think that Blessard's presence in the home would be useful. The more quickly Wood could identify NW, the more quickly he could determine whether she needed assistance. And if she was frightened and hiding in the home, the one thing she might respond to was a parent's reassuring voice. If the missing NW was being held against her will, she might well answer a parent, but not a stranger.

Even to this day, plaintiffs have not suggested any remotely practical course of action Wood should have pursued. Wood could have entered alone and asked any girl he encountered to identify herself. But he had no guarantee of getting an answer, much less a truthful one. He wasn't even sure the missing girl was conscious or hadn't passed out. He could have required any girl who was possibly the missing NW to come outside in the dark after midnight to be identified by Blessard, but such a procedure would be more traumatic to young girls than the one

actually used. Further, these alternatives would have been time-consuming, and time was one thing this officer did not have a whole lot of. It's always tempting to go the could-have/should-have route in hindsight, but that is not how the Supreme Court has structured the objective reasonableness inquiry. If a unanimous panel of this court believed upon reflection that Wood's actions were reasonable, how was he to figure otherwise in the fleeting minutes he had? We thankfully know now that NW is safe and that the Hunsberger home was not vandalized or burned to the ground. But no one knew at the time. For these reasons and those expressed in the panel opinion, I believe en banc review was properly denied.

DIANA GRIBBON MOTZ, Circuit Judge, dissenting from the denial of rehearing en banc:

The Fourth Amendment to the Constitution of the United States assures us that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Those words do not contain an idle promise or advance a novel proposition. Rather, they embody our country's "centuries-old principle of respect for the privacy of the home." Wilson v. Layne, 526 U.S. 603, 610 (1999). A panel of this court has abandoned this time-honored promise to hold that a police officer who, without warrant, searches a private home in the middle of the night and allows a civilian to accompany him does not -- as a matter of law -- violate the Fourth Amendment. See Hunsberger v. Wood, 570 F.3d 546 (4th Cir. 2009). With deep

regret, I dissent from the full court's refusal to consider this case en banc.

I.

On February 2, 2007, a neighbor of Cheryl and Mark Hunsberger called 911 twice -- first at ten in the evening and then at midnight -- to report cars coming from and going to, and noise coming from, the Hunsberger family home. Because the neighbor had not seen the Hunsbergers for a few days, she believed this activity suspicious. Sergeant J.A. Wood and Deputy Jody Edwards answered both 911 calls.

Responding to the first call, the officers found two cars parked in front of the Hunsberger home; they did not regard this suspicious and so left within five minutes. Responding to the later call, the officers saw an additional car parked in front of the house. Sgt. Wood contends that he saw lights turn off inside the house, and he noticed an open garage door, which had previously been closed. He maintains that he knocked and rang the Hunsbergers' doorbell repeatedly. (Six of the occupants of the Hunsbergers' home testified under oath that they never heard any knock or doorbell. J.A. 67, 288-89, 762, 950, 1437-38, 1486.) Sgt. Wood acknowledges that he did not attempt to telephone the Hunsbergers; instead, he contacted the owners of the three cars parked in front of their house and, speculating that teenagers -- probably drinking -- had driven them, asked that the cars be retrieved. J.A. 1303-06, 1618, 1626.

In response to Sgt. Wood's call, William Blessard drove to the Hunsbergers' home; he told Sgt. Wood that his stepdaughter, who was supposed to be spending the night elsewhere, had been driving one of the cars. The owners of the other two cars arrived shortly thereafter and drove those cars away without Sgt. Wood or Deputy Edwards questioning them at all. Blessard called his stepdaughter's cell phone, but she did not answer.

Blessard and Sgt. Wood then approached the house, at which point Sgt. Wood claims to have heard "something being knocked over in the garage." Without calling for backup, obtaining a search warrant, or attempting to telephone the Hunsbergers, Sgt. Wood entered and conducted a search of the entire three-story home. Although Sgt. Wood did not find it necessary to ask Deputy Edwards, the other officer on the scene, to accompany him, he did permit Blessard -- an untrained civilian -- to join him inside the Hunsbergers' home. J.A. 406, 441, 1332-33, 1154-55. In the course of the search (which yielded neither the stepdaughter nor any danger) Sgt. Wood and Blessard questioned the Hunsbergers' sixteen-year-old son and then awakened their ten-year-old daughter. J.A. 432-33, 1343-53. As Sgt. Wood and Blessard pulled her covers down and shined a flashlight in her face, the young girl began screaming. J.A. 950-51, 1486.

The Hunsbergers awoke to their child's screams and discovered two strange men in their home. J.A. 950. Dissatisfied with the explanation that the two men had entered without a warrant to

search for Blessard's stepdaughter, the Hunsbergers asked them to leave, which they did.[1] After Sgt. Wood and Blessard finally left, the police apparently engaged in no further search for Blessard's stepdaughter; Blessard explained that he did not protest this inaction because, after all, "the law is the law . . . . I mean, do you want to search every house on the block?" J.A. 443.

The Hunsbergers brought this case, maintaining that in entering and searching their home without a warrant and permitting a civilian to participate in this unauthorized entry and search, Sgt. Wood violated their Fourth Amendment right to be free from unreasonable searches. The experienced district judge denied Sgt. Wood's motion for summary judgment. See Hunsberger v. Wood, 564 F. Supp. 2d 559, 565-70 (W.D. Va. 2008). A panel of this court reversed, holding as a matter of law that Sgt. Wood's actions did not violate the Constitution. The panel concluded that exigent circumstances not only compelled Sgt. Wood to enter and search a family home without a warrant in the middle of the night, but also allowed him to permit a civilian to accompany him. See Hunsberger, 570 F.3d at 555–57.

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[1] The Hunsbergers shortly thereafter discovered that their sons had invited friends over; some of those friends (including the stepdaughter) had been drinking and hid in the basement when the police arrived. All of the friends safely returned to their homes that night.

II.

The panel's holding permits what the Constitution prohibits. "At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Kyllo v. United States, 533 U.S. 27, 31 (2001) (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)) (internal quotation marks omitted). Indeed, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." Payton v. New York, 445 U.S. 573, 585 (1980) (quoting United States v. United States Dist. Court, 407 U.S. 297, 313 (1972)) (internal quotation marks omitted).

Courts are thus exceedingly reluctant to permit even trained, professional police officers to cross the threshold into a private home. See, e.g., Georgia v. Randolph, 547 U.S. 103 (2006); Mincey v. Arizona, 437 U.S. 385 (1978); Silverman, 365 U.S. 505. Of course, sometimes the sanctity of the home must yield to public interest; on those rare occasions, the police may enter in order to execute a valid warrant. See Payton, 445 U.S. at 586.

But, with "few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." Kyllo, 533 U.S. at 31. Exigent circumstances present one of these few exceptions. However, the circumstances must truly be exigent: this exception permits a police officer to "enter a home without a warrant to render emergency

assistance to an injured occupant or to protect an occupant from imminent injury." Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (emphasis added); see also United States v. Moss, 963 F.2d 673, 678 (4th Cir. 1992) ("[T]he [officer] must have had an objectively reasonable belief that an emergency existed that required immediate entry to render assistance or prevent harm to persons or property within.").

As for civilians, even when a warrant sanctions the entry of the police, "it is a violation of the Fourth Amendment for police to bring . . . third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant." Wilson, 526 U.S. at 614. When, as here, the police do not obtain a warrant, any search is "circumscribed by the exigencies which justify its initiation." Horton v. California, 496 U.S. 128, 139–40 (1990). It is difficult to imagine any exigency that would compel an officer to allow a civilian into a private home, particularly when another trained police officer was at the scene and available to assist in remedying the asserted exigency. In fact, prior to the panel's decision, no court had ever held that even truly exigent circumstances authorized a police officer to permit an untrained civilian to participate in the warrantless search of a private home. It seemed settled that police officers "would never let a civilian into a home. . . . That's just not allowed." Wilson, 526 U.S. at 624 (Stevens, J., concurring and

dissenting in part) (quoting the sheriff who supervised the defendant police officers).[2]

III.

A.

Although the panel holds Sgt. Wood's warrantless search of the Hunsbergers' home justified as a reasonable response to an emergency, Sgt. Wood's own testimony clearly provides a basis from which a fact finder could conclude that he did not respond to an emergency. For Sgt. Wood testified that he never requested backup, J.A. 1310; never asked for assistance from Deputy Edwards, J.A. 1401; never unholstered his weapon, J.A. 1329; and never even attempted to telephone the Hunsbergers, J.A. 1364. The panel either ignores or trivializes these facts. But considering them in the light most favorable to the Hunsbergers (as we must at this

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[2] In United States v. Sparks, 265 F.3d 825 (9th Cir. 2001), overruled on other grounds by United States v. Grisel, 488 F.3d 844 (9th Cir. 2007), the court considered whether an officer could allow a civilian to participate in the warrantless search of a car. Even in this context, which involves a much less potent privacy interest than a home, see South Dakota v. Opperman, 428 U.S. 364, 367 (1976), the court concluded that such civilian involvement was not permitted unless the officer demonstrated that he was "in need of assistance," i.e., that he could not safely summon another officer to help him or conduct the search by himself. See Sparks, 265 F.3d at 832. Sgt. Wood, of course, cannot meet even this standard, as he left another officer, Deputy Edwards, outside while he searched the Hunsbergers' home with Blessard.

stage), at the very least they suggest a dispute as to whether Sgt. Wood had an objectively reasonable belief that an emergency authorized his warrantless entry and search of a private home. [3]

The panel not only ignores these critical facts, it also attempts to draw support for its unprecedented holding from markedly different cases in which officers entered a home to break up a fight, Stuart, 547 U.S. at 406; to extinguish a fire, Michigan v. Tyler, 436 U.S. 499, 509 (1978); to capture a fleeing, armed suspect, Warden v. Hayden, 387 U.S. 294, 298 (1967); or to prevent the imminent destruction of evidence, Ker v. California, 374 U.S. 23, 40 (1963). In each of those cases, the officers had actual knowledge of an imminent threat to life, property, or evidence. Sgt. Wood does not even claim to have had such knowledge here. Accordingly, those cases provide no support for the panel's conclusion that exigent circumstances authorized Sgt. Wood's entry and search of the Hunsbergers' home. "To put it simply, a burning building is not the same as an open garage door in terms of the immediacy of threat

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[3] The concurrence repeatedly notes that "two people fled the darkened premises" as Sgt. Wood approached. This would be relevant, but of course not dispositive, if Sgt. Wood saw people fleeing the "premises" prior to the search. But the record contains no evidence that he did; Sgt. Wood certainly did not testify to such a sighting. No matter how compelling the concurrence now finds this fact, it cannot retroactively provide any justification for Sgt. Wood's decision to enter and search the Hunsbergers' home. See Tennessee v. Garner, 471 U.S. 1, 26 (1985) (noting that "[t]he clarity of hindsight cannot provide the standard for judging the reasonableness of police decisions").

each presents." United States v. Bute, 43 F.3d 531, 538 (10th Cir. 1994).

B.

The panel follows its exigency ruling with a holding that Wilson v. Layne -- in which every member of the Supreme Court agreed that the Constitution did not permit police, even when executing a warrant, to allow third parties to accompany them into a private home -- somehow authorized Sgt. Wood, acting without a warrant, to permit Blessard to enter the Hunsbergers' home. The panel rests this remarkable conclusion on Blessard's ability to identify his stepdaughter, which the panel (after a scant paragraph of analysis, see Hunsberger, 570 F.3d at 556-57) finds "related to the objectives of the authorized intrusion." Id. at 556 (quoting Wilson, 526 U.S. at 611).

In doing so, the panel wrenches the Wilson language from its context. The sentence from which the panel selectively quotes reads, in its entirety, "[w]hile this does not mean that every police action while inside a home must be explicitly authorized by the text of the warrant, the Fourth Amendment does require that police actions in execution of a warrant be related to the objectives of the authorized intrusion." Wilson, 526 U.S. at 611 (emphasis added) (citation omitted). Thus, the Wilson Court specifically limited its observation to cases in which the police secured a warrant; that, of course, never happened here. Given the disfavor accorded warrantless entries, the panel's failure even to

acknowledge the critical difference between this case and Wilson is telling -- and deeply troubling.

Moreover, the panel ignores the fact that the Wilson Court expressly rejected the several justifications offered by the defendant police officers as to why the presence of civilians -- in that case, reporters -- was "related to" the execution of the warrant. Id. at 614. The police in Wilson argued that they should have discretion to determine when the presence of reporters would further law enforcement interests, that media ride-alongs facilitate accurate reporting about law enforcement, and that the presence of reporters would curb police misconduct and protect the safety of officers. Id. at 612-13. In rejecting these arguments, the Supreme Court established that the phrase "related to the objectives of the authorized intrusion," on which the panel so heavily relies, requires police officers to do more than provide a post-hoc rationalization for allowing a civilian to enter a private home.

Yet the panel's holding that Blessard's presence in the Hunsberger's home was "related to" Sgt. Wood's response to exigency rests on precisely this sort of post-hoc rationalization, namely that Blessard's ability to identify his stepdaughter assisted, and so is "related to," Sgt. Wood's search. Moreover, this rationalization is far weaker than those rejected in Wilson because the record here contains substantial evidence suggesting that Blessard's "assistance" was neither necessary nor solicited. Both Blessard and Sgt. Wood, himself, offered testimony from which a fact finder could certainly conclude that Blessard did not enter the

Hunsbergers' home to assist Sgt. Wood, and Sgt. Wood did not allow Blessard to join him for this purpose.[4] For example, Blessard swore under oath that when he entered the home, his "sole purpose was to locate [his] step-daughter," that "Sergeant Wood never invited or instructed [him] to enter the home," and that Sgt. Wood never even spoke to him during the search. J.A. 403, 404, 406, 607-08. Rather, Blessard explained, he "just mill[ed] around" the Hunsbergers' home on his own. J.A. 408.

Sgt. Wood similarly testified that at various points during the search, he did not know where Blessard was, J.A. 1331, 1332-33, 1335, 1337-38, and that at no point did he "give[] [Blessard] any instruction whatsoever." J.A. 1335. Sgt. Wood explained that it would have been inappropriate for

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[4] Even if Sgt. Wood and Blessard had acted in concert, the panel's reasoning would fail because ascertaining a girl's identity would not have helped the police in saving her from imminent harm. If Sgt. Wood had found a girl in the type of distress contemplated by "exigent circumstances" -- e.g., seriously ill or injured, or held against her will -- the girl's identity would be irrelevant. In Moss, 963 F.2d at 679, we rejected a federal officer's contention that obtaining missing campers' identification in order to provide them medical aid justified the officer's entry into an empty cabin. We explained: "That a lost or injured or dead camper was named John Doe rather than Richard Roe was a complete irrelevance to [the officer's] stated concern." Id. If Sgt. Wood had found several girls in distress, the panel's logic suggests that rather than help them all, he should have identified Blessard's stepdaughter and singled her out for aid. But, of course, in an emergency, a police officer must assist any person in need. Permitting Blessard to enter the Hunsbergers' home was not even loosely "related to" that duty.

him to request assistance from a civilian except in a serious emergency, "like if you have a riot on the street." J.A. 1403-04. In sum, both men repeatedly acknowledged that Sgt. Wood neither sought nor obtained Blessard's entry into the Hunsbergers' home in order to respond to a true emergency.[5] A fact finder could certainly credit their testimony on this point and so reasonably conclude that Sgt. Wood's actions -- allowing an untrained, unarmed civilian to mill around a private home, at times unattended -- were not "related to" any perceived emergency occurring within the Hunsbergers' home.

Thus, rather than supporting the panel's view, Wilson makes it clear that the Fourth Amendment prohibits a civilian's entry into a private home under these circumstances. As we explained in Buonocore

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[5] The panel cautions against judging Sgt. Wood's actions in hindsight, but based on what he knew at the time, Sgt. Wood's decision to allow Blessard into the Hunsbergers' home was not only unconstitutional, but also unwise. Blessard is not a police officer trained to respond to crises as a professional; he is a parent who was "worried sick" about his child. He testified that he was "scared to death" for his stepdaughter's safety as he searched the home. It is sheer luck that when he encountered the Hunsbergers, neither Blessard nor the Hunsbergers -- themselves overwrought by the intrusion -- attempted to take matters into their own hands. Many parents would not have been so docile, and Sgt. Wood had no way of knowing how Blessard, whom he had just met, would fare in the home. If Sgt. Wood truly believed that Blessard's stepdaughter was in danger, then allowing Blessard to enter the Hunsbergers' home served only to inject uncertainty and volatility into an already tense situation and expose everybody in the house to additional risk. It is the panel that has viewed Sgt. Wood's actions in hindsight in its attempt to rationalize them.

v. Harris, 65 F.3d 347, 356 (4th Cir. 1995), "the Fourth Amendment prohibits government agents" from "facilitat[ing]" an untrained civilian's search of a private home. (Even Blessard acknowledged this limitation. See J.A. 443.)

IV.

If Sgt. Wood unjustifiably searched the Hunsbergers' home and allowed Blessard to accompany him in this search, as the facts, viewed in the best light for the Hunsbergers, surely indicate, Sgt. Wood clearly violated the Hunsbergers' constitutional rights. Of course, to recover money damages, the Hunsbergers will have to offer proof as to the harm they have suffered, but they should be given an opportunity to do so. See Hudson v. Michigan, 547 U.S. 586, 597-99 (2006) (noting that money damages provide an important remedy for violations of the sanctity of the home).

For, after all, a police officer accompanied by an untrained civilian entered the Hunsbergers' home in the dead of night. These men searched the entire house. They accosted the Hunsbergers' children. If the sanctity of the home is to mean anything, then the police must understand that they cannot use the narrow doctrine of exigency as a crowbar to pry open our homes to unnecessary intrusions.

Justice Kennedy put it well, recently noting that:

> [P]rivacy and security in the home are central to the Fourth Amendment's guarantees as explained in our decisions and as understood since the beginnings of the Republic. This common understanding ensures respect for the law and allegiance to our institutions, and it is an instrument for transmitting our Constitution to later generations undiminished in meaning and force. . . . [I]t is a serious matter if law enforcement officers violate the sanctity of the home by ignoring the requisites of lawful entry. Security must not be subject to erosion by indifference or contempt.

Hudson, 547 U.S. at 603 (Kennedy, J., concurring).

The panel's holding works an injustice on the Hunsbergers and creates an unsupportable and unsound precedent. I regret that a majority of my colleagues have not seen fit to correct this affront to the Constitution -- and hope that another court will do so.

No. 09-689

U.S.
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JAN 13 2010

In The Supreme Court of the United States

MARK J. HUNSBERGER;
CHERYL A. HUNSBERGER,

Petitioners,

v.

J. A. WOOD, Deputy Sheriff,
Botetourt County Sheriff's Office,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether this Court should deny the petition where the Fourth Circuit Court of Appeals correctly found that Sergeant Wood lawfully searched a home without a warrant where a neighbor reported suspicious activity and the absence of homeowners, Sergeant Wood observed activity confirming that persons were in the house that should not be there, a concerned father reported that his step-daughter could not be found, and doors into the home were unsecured?

II. Whether this Court should deny the petition where, even if the search was not lawful, the law was not clearly established and an officer, under the circumstances confronted by Sergeant Wood could reasonably believe that his actions were lawful given that courts have found warrantless searches of homes constitutional in circumstances that were less compelling than those faced by Sergeant Wood?

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STATEMENT OF THE CASE

Petitioners begin their statement of facts with an attempt to outrage this Court by stating that Sergeant Wood exposed the unclothed body of a young girl during the course of the search of a home. (Pet. at 3.) There is absolutely no evidence that petitioners' daughter, who is not a party to this action, was unclothed. While looking for a missing girl, the bed covers of the girl were pulled down, from the foot of the bed, revealing her face to the tops of her shoulders at the head of the bed and revealing the fact that she was not the missing girl. (JA 1348-48, 1457.[1]) Petitioners' daughter was mad because Sergeant Wood was shining a flashlight and she was trying to sleep. (JA 1444.)

The facts in the record show that on the evening of Friday, February 2, 2007, and into the early morning hours of Saturday, February 3, 2007, Sergeant Jeff Wood, an eighteen year veteran of the Botetourt County Sheriff's Office, was confronted with two 911 calls from a neighbor reporting suspicious activity at the petitioners', Mr. and Mrs. Hunsberger's, home. The Hunsbergers were reportedly out of town and the neighbor was worried that the house was being vandalized. Sergeant Wood observed suspicious activity at the house, thought a person or persons had fled the house when a previously closed door was found open, learned of a missing girl whose car was parked in front of the house, and, after observing that someone was still in the house, entered the house to make sure the home

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[1] Citations to "JA" are citations to the Joint Appendix filed with the Fourth Circuit Court of Appeals.

was not being vandalized and to look for and check on the missing girl. Twenty-four days later, Sergeant Wood was sued by Mr. and Mrs. Hunsberger.

The material facts pertinent to this appeal are undisputed. Sergeant Jeff Wood and Deputy Jody Edwards were dispatched based upon two 911 calls placed by Charlene Klik, a neighbor and self-described friend of the Hunsbergers, because of suspicious activity at the Hunsberger home. (JA 1098-99, 1267, 1275, 1411.) Ms. Klik thought that the Hunsbergers were on vacation and she became concerned when she noticed multiple cars coming and going from the Hunsberger home and the activity in the front of the home. (JA 221-22, 225, 231.) Ms. Klik thought that the Hunsberger home was being vandalized or burglarized. (JA 221-23, 230.)

Indeed, other testimony supports the coming and going of vehicles and activity in front of the house. The Hunsberger's teenage boys and five of their friends were at the house and made multiple trips in and out of the house. (JA 51-53, 55-56, 128, 139-40, 276, 634, 705, 1102.) Throughout the evening, some of the teens were drinking beer and/or vodka despite the fact that the Hunsbergers told their oldest son that there would be no alcohol in the house. (JA 46, 633.) The Hunsbergers themselves were home and went to bed upstairs where their daughter was also sleeping. The Hunsbergers testified that they were unaware of any of the activities in and around their house except they

knew that their sons were down in the basement with two other boys. (JA 944-45, 1478, 1482.)

In responding to the first 911 call Sergeant Wood observed two vehicles parked in front of the house and some lights on in the house. No persons or suspicious activity was observed at this time, so he left the scene. (JA 1102, 1107, 1270.)

Ms. Klik continued to notice additional cars and additional suspicious activity at the Hunsberger home. (JA 237-40, 244.) This is again consistent with the teenagers' activities and the coming and going of people and vehicles. (JA 54-55, 94, 138, 146, 508, 521.) Ms. Klik placed her second call to the Botetourt County 911 at 12:10 a.m. (JA 913-17.) Both Deputy Edwards and Sergeant Wood were again dispatched to the Hunsberger home. (JA 239, 915-17.) When the officers arrived at the Hunsberger home the second time, they noticed the presence of an additional third car parked in front of the home. (JA 1110.) One car was sticking out into the road more than the others, and the manner in which the cars were parked concerned Sergeant Wood because they were partially blocking the road and creating a hazard. (JA 1279, 1281.) Sergeant Wood parked his car and observed from a distance that there were lights on inside the home, and through the garage window he observed the lights in the garage come on, and a young man enter the garage from inside the home, quickly pass by the window, and then leave the garage. (JA 1276.)

Deputy Edwards again spoke with Ms. Klik and informed Sergeant Wood that the homeowners

were out of town and that Ms. Klik was concerned for the homeowners' property. (JA 1269.) She thought the house was being vandalized and that the Hunsbergers were on vacation. (JA 221-23.) Sergeant Wood, himself, had not spoken with Ms. Klik.

Approaching the Hunsberger House – Lights

The two officers decided to approach the Hunsberger home to find the owners of the vehicles to ask them to move their cars, and to determine what was going on in response to Ms. Klik's concerns. (JA 1117-18, 1283-84.) Sergeant Wood and Deputy Edwards pulled both their vehicles into the Hunsberger driveway and, as they were about halfway up the driveway, the lights in the interior of the home on the first floor went out. (JA 1118-19, 1284.)

Contrary to petitioners' contention that the lights did not go out, this fact is not disputed. Matt Deane was talking about garage lights when he testified that the lights were off and had been turned off for awhile. (JA 148-49.) Mr. Deane, one of the teen friends, was outside when he first saw the law enforcement vehicles cut their lights off up the road and all of the sudden they were pulling in the Hunsbergers' driveway (JA 148). When shown his Virginia State Police statement, Mr. Deane stated that he warned Zach Hunsberger that the officers were there and he ducked under the garage window and either AH or Zach Hunsberger cut the lights off (JA 173). The teens did not recall if the lights on the main floor of the house were on or off or if anyone

turned lights off as they scrambled to hide from the officers. (JA 81, 306, 538, 651-52.)

Doorbell

Sergeant Wood walked to the front porch and rang the doorbell normally and then 25 to 30 times when there was no response. (JA 1120, 1289-90.) Both Sergeant Wood and Deputy Edwards could hear the doorbell ringing from the front porch. (JA 1120-21, 1290.) Matt Deane saw the officers approaching the front door and look like they were starting to knock before he ran from the house, and Zach Hunsberger saw the officer going towards the front door before he left. (JA 149, 652.) When no one responded to the doorbell, Sergeant Wood and Deputy Edwards walked back to their cars in the driveway. (JA 1121, 1291.)

According to Mr. Hunsberger, the doorbell box is in the front hallway by the front door. (JA 941.) Mr. Hunsberger tested the doorbell that night when he was told they had been ringing it because "sometimes their doorbell doesn't work. (JA 964.) Mr. Hunsberger pushed it at that point and it did ring, but it was very soft. It's a very soft doorbell." (JA 964.)

The Hunsbergers and their daughter were sleeping. (JA 947, 949-50, 1484-85.) The Hunsbergers claim to have heard nothing the entire evening, including the teens many trips in and out of the house, the knocking and banging on the basement door, or the shouts for NW that the teens reported, so it is no surprise that they did not hear

the doorbell. (JA 950, 1486.) Similarly, the teens were not in a position to hear the knocking or door bell – some of the teens, including the petitioners' son, had fled the home and the other teens were hiding in a closet under the basement stairwell. Aaron Cooper, NW and AH hid in a small closet area under the basement stairwell. (JA 57, 60.) LH went up to his room. (JA 750.)

Open Door

As they were walking from the front door back to the driveway, Sergeant Wood and Deputy Edwards noticed a walk-in door on the side of the garage (which led from outside into the garage) was now open. This same door had been closed when they first pulled into the driveway minutes before. (JA 1122, 1291-92.) Sergeant Wood explained that at this point he assumed that someone had exited the home from that garage door as he was ringing the doorbell. (JA 1295.) He did not know whether anyone remained in the house.

Again petitioners then try to make an issue of the walk-through garage door and whether the officers observed it to be open when this fact is undisputed. Petitioners contend that Matt Deane said he shut the door. Matt Deane actually testified that Zach Hunsberger was right behind him at the walk-through door; they opened the door, walked out and then shut it, left out the backyard and just took off. (JA 150.) Matt Deane did not say who shut the door, but in any event Zach Hunsberger was behind him. Zach Hunsberger testified that he left through the walk-through garage door on the side with Matt

Deane following him and they ran to a friend's house. (JA 652.) The boys ran (JA 150, 652); they did not stay around to see if the door had latched properly. Mr. Hunsberger testified that Sergeant Wood told Mr. Hunsberger that the door was ajar. (JA 985.) Mr. Hunsberger was not surprised as "that door doesn't always close properly...." (JA 985.)

Upon discovery of the now open door, Sergeant Wood entered the garage and shined his flashlight around the garage. (JA 1292-93.) Sergeant Wood saw a stairwell that led from the interior of the garage to the basement and a closed door at the bottom of this set of stairs. (JA 1294.) He went down the stairs and knocked on the basement door. (JA 1294.) After receiving no response, Sergeant Wood left the house, returned to his car and moved his car back onto the street. (JA 1295.)

Contact with Vehicle Owners

Sergeant Wood then contacted the dispatcher to run the license plates so he could contact with the owners of the vehicles parked in front of the Hunsberger home. (JA 1296, 1298-99, 1303.) Sergeant Wood spoke on his cell phone with Matt Deane's mother, Aaron Cooper's mother and NW's stepfather, Mr. Blessard. (JA 1303, 1305.) Each parent indicated that he or she would come to collect their vehicle. (JA 1305.) Sergeant Wood cautioned that the drivers of the vehicles might be drunk and unable to operate the vehicles.[2] (JA 1603-32.)

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[2] Vandalism and teen drinking are not mutually exclusive.

Sergeant Wood explained his concerns as follows:

> I have an open door which is an unsecure dwelling, I have information that the homeowners are gone, out of town, I've seen people in this home, so I don't know if it's being robbed like Ms. Klik told me, if it's being vandalized. I'm concerned for basically the property of the Hunsbergers.

(JA 1304.) Sergeant Wood also explained that he was concerned because, approximately two weeks earlier, another home in the neighborhood had been burned down. (JA 1315-17, 1338.) He had previously found that vacant home unsecured, as it was on the security check list, and found evidence of people having been in the house drinking and burning candles. (JA 1362.)

Defendant Blessard arrives at the Hunsberger Home and is Concerned

Mr. Blessard was the first of the parents to arrive at the Hunsberger home. (JA 1306.) When he arrived at the scene, he was greeted by Sergeant Wood, who explained to him what had transpired that evening. (JA 373-74, 1308.) Mr. Blessard observed NW's car parked in a haphazard fashion in front of the Hunsberger home. (JA 366.) He did not know or know of the Hunsbergers. (JA 374, 377.) Mr. Blessard and Sergeant Wood then discussed the fact that his stepdaughter, NW, was supposed to be

sleeping over at a girlfriend's home and that she was not supposed to be at this – the Hunsberger -- residence. (JA 368, 1308.) Mr. Blessard had "deep concern for [his] daughter" at this time. (JA 369.) He tried to call NW on her cell phone without success, which was unusual. (JA 375-76.) He explained his mindset at the time as follows: "I mean, something was going on and I didn't understand what was going on." (JA 376.)

Amazingly, petitioners try to manufacture a disputed fact because Mr. Blessard's emotional state was not set forth in Sergeant Wood's report. They speculate that perhaps Blessard really did not care about the well-being of his stepdaughter. Even Mr. Hunsberger commented that NW's father was worried sick (JA 966), and the teens' testimony that they heard beating on the basement door (JA 64-65) and heard him yelling for NW while in the house (JA 64-65, 289, 556, 762).

Noise in Garage

Sergeant Wood suggested that they approach the home together to see if Blessard could get someone to come to the door so that they could find his daughter. (JA 1308.) As Sergeant Wood and Blessard passed the garage on the way to the front door, they heard a noise like something being knocked over in the garage. (JA 401, 1309 – 10, 1421.) Sergeant Wood immediately went to the walk-in door on the side of the garage (which had been open earlier) thinking that someone might be trying to leave the home. (JA 1309.) Sergeant Wood entered this door into the garage and heard the door

at the bottom of the stair well into the basement shut and lock.[3] (JA 1309.) Blessard then entered the garage and Sergeant Wood explained to him that he heard the door at the bottom of the stairs leading into the basement shut and lock. (JA 1311.) Aaron Cooper admits that he went up the basement steps, which would require him to first open the door, and "they heard me shut the door or go down the stairs...." (JA 64-65.) In other words, Aaron Cooper admits he made noise in the garage even if he did not knock anything over. Mr. Blessard then descended the stairwell (from the interior of the garage to the basement) and knocked loudly and was beating on the basement door calling out for NW. (JA 65, 1311, 1314.) Many of the teens reported hearing this. (JA 65, 971-72, 74, 762, 1518.) Meanwhile, Deputy Edwards left the area when he saw Ms. Cooper pull up to retrieve one of the vehicles. (JA 1147.)

Entry into Home

Sergeant Wood explained that at this point in time he knew: (i) that someone was still in the home; (ii) that there was an open door to the home; and (iii) that the Hunsbergers have been reported by a concerned neighbor and friend to be out of town. (JA 1314.) Sergeant Wood then proceeded to the door leading from the garage into the home and found that this door was unlocked. (JA 1314-15.) Sergeant Wood explained:

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[3] This is the stairwell that leads from the interior of the garage to the basement.

> Basically now I have an open door and an unsecured door on a home that the homeowners are gone, and I've seen people in this home that have acted suspiciously in the fact that a simple doorbell ringing, knocking on the door, they won't come to the door, all the lights went off when I approached the home. All that's adding up to the suspicion of these people don't belong in this home, whoever is here could be robbing it, tearing it up, vandalizing it, I'm not sure. Just down the street here we had a home burn down from, apparently, people coming in it and I don't know what all they were doing in there, but it was a vacant home that was for sale and it ended up burning down [shortly before this incident].

(JA 1315-16.) In addition to the concerns regarding the Hunsbergers' home, Sergeant Wood explained his concern regarding NW as follows: "She's 16 years old, it's past her curfew, she's not where she's supposed to be ...." (JA 1321.)

Sergeant Wood then entered the home through the door from the garage with the goal of finding Blessard's missing stepdaughter and whoever else was improperly in the house.[4] (JA 1317, 1321.) Sergeant Wood proceeded to canvas the interior of the home using his flashlight. (JA

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[4] Deputy Edwards report does not state that he went into the home – he notes that he entered the garage. (JA 1179.)

1322.) Sergeant Wood loudly announced himself in the home. (JA 1328.) Blessard followed Sergeant Wood into the home, and the two went downstairs to the basement. (JA 1323.) Blessard was not invited to enter the home by Sergeant Wood – nothing was said. (JA 1361.) Sergeant Wood proceeded to search the basement, where he noticed an open carton of beer on the floor. (JA 1326-27.) After failing to locate anyone in the basement, they returned to the main level of the home and searched the main level. (JA 1331-32.) Up until this point, Sergeant Wood had not said anything to Blessard inside the home. (JA 1335.)

Express or Implied Consent

The parties do dispute whether there was expressed or implied consent with regard to Mr. Blessard's presence in the house.

Sergeant Wood then proceeded to the second floor of the home and Blessard followed. (JA 1336-37.) After confirming that the first bedroom was clear, Sergeant Wood proceeded to the second bedroom where he observed a dog walk out of the closet. (JA 1340-41.) Sergeant Wood then discovered LH sitting on the floor of his closet in his boxer shorts. (JA 1343.) When Sergeant Wood asked LH where everyone was, LH responded, "They are not here," as if he was asking a question. (JA 1344.) He was asked if he was home alone and he just kept saying "Huh?" or "What?" (JA 424.) LH remembers Sergeant Wood asking him where NW was. (JA 756.) LH then just walked past Sergeant Wood and proceeded down stairs without seeking out

his parents. (JA 1344.) Sergeant Wood then proceeded to the next bedroom where he saw a young girl laying in bed awake. (JA 1346.)

Sergeant Wood testified that he moved the covers off the girl's face to her chin so that he could see her face. (JA 1349.) Blessard, who was standing in the doorway, confirmed to Sergeant Wood that the girl was not his daughter. (JA 1350.) The Hunsbergers' daughter testified that both men pulled her covers down to just below her shoulders from the bottom of the bed. (JA 1441-42, 1456-67.) Sergeant Wood testified that the girl stated *in a normal voice*, "Turn the lights out, they are not in here." (JA 1350-51.) The Hunsberger daughter testified in her deposition that her only statement to Sergeant Wood was, "Go away. I'm trying to sleep" and "Stop it." (JA 1441, 1444.)[5] Sergeant Wood then exited the girl's room and was confronted by Mr. Hunsberger in the hall. (JA 1351.) Mr. Hunsberger confirmed to Sergeant Wood that he was the homeowner and the three men went downstairs. (JA 1353.)

As Sergeant Wood stated, everything changed when he found out the homeowners were present. He realized the information given by the neighbor was inaccurate. (JA 1354.) The search, which lasted maybe ten minutes (JA 1366), was over.

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[5] Both Mr. and Mrs. Hunsberger claim that their daughter screamed but their daughter did not claim that she screamed. (JA 950, 1486.)

Post Search

After they descended the stairs and entered the kitchen, Sergeant Wood was attempting to explain to Mr. Hunsberger why they were in the home – including the fact that there was a missing teenage girl whose car was parked in front of Mr. Hunsberger's home. (JA 955, 1355, 1373.) He told Mr. Hunsberger he was advised that the homeowners were not home. (JA 435, 1353, 1355, 1357.) Mr. Hunsberger does not remember exactly what Sergeant Wood was saying. (JA 956.) While Mr. Hunsberger asserted that Sergeant Wood just kept repeating that he was looking for Mr. Blessard's daughter (JA 953-55), he was reminded throughout his deposition of other items that Sergeant Wood had explained. He explained that the garage door was ajar. (JA 958.) He may have explained that he searched the house and no one was found. (JA 967.) The Hunsbergers told the State Police that Sergeant Wood could have been looking for intruders being that the door was open. (JA 1052.) Mr. Hunsberger told Sergeant Wood to leave his house. (JA 1355, 1373.) The concerns about NW were ignored by the Hunsbergers. Mrs. Hunsberger called 911 to report a breaking and entering by Sergeant Wood. (JA 956, 959-60, 1357, 1488, 1491-92.) Both Sergeant Wood and Mr. Blessard then left the Hunsberger home. (JA 1359.) Not surprisingly, Sergeant Wood expected them to file a complaint, so he called for his supervisor. (JA 1358-59.)

About fifteen minutes after Mrs. Hunsberger's 911 call, Lieutenant Blessard (no relation to Mr. Blessard) of the Botetourt County Sheriff's Office

arrived at the Hunsberger home to take their complaint. (JA 960-61, 963-64.) The Hunsbergers spoke with Lieutenant Blessard for about ten to fifteen minutes. (JA 964.)

The Hunsbergers found the teens hiding in the basement, and Mr. Hunsberger told his wife to take NW home because her father "is worried sick about her." (JA 964-66.)

REASONS FOR DENYING THE PETITION

Petitioners have not presented compelling reasons for review by this Court, as required by Rule 10 of the Supreme Court Rules, because petitioners' alleged disputes of fact are not supported by the record, the factual findings of the Court of Appeals were not erroneous, and the Court of Appeals' decision is consistent with precedent. The Court of Appeals correctly found that petitioners suffered no constitutional violation and, even if a constitutional violation occurred, Sergeant Wood would still be entitled to qualified immunity as the law was not clearly established.

I. The Court of Appeals Did Not Overlook or Misapprehend the Summary Judgment Standard or the Facts.

Petitioners again assert, as they did before the Fourth Circuit Court of Appeals, that there are genuine issues of material fact that preclude the granting of summary judgment. Petitioners then attempt to manufacture issues of fact based upon speculation and snippets of testimony taken out of

context. However, the facts relied upon in the Court of Appeals are either not in dispute or are construed in a light most favorable to petitioners.

The summary judgment standard was not overlooked or misapprehended by the Court of Appeals. Where the nonmoving party "will bear the burden of proof at trial on a dispositive issue," the nonmoving party bears the burden of production under Rule 56 to "designate specific facts showing that there is a genuine issue for trial" (internal quotation marks omitted)). *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Petitioners bear the burden of proof as to whether the facts show a violation of a constitutional right. *Bryant v. City of Cayce*, 332 Fed. Appx. 129, 132 (4th Cir. 2009).

As this Court recently reiterated, "[o]n a motion for summary judgment, 'facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2677 (2009) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)). Indeed, the nonmoving party cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another. *Barwick v. Celotex Corp.*, 736 F.2d 946, 963 (4th Cir. 1984). "Genuine" disputes are those that show a true conflict between established facts. *Nasis-Parsons v. Wynne*, 2006 WL 1555913 at *2 (E.D. Va. 2006) (citing *Thompson Everett, Inc. v. Nat'l Cable Adver., L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995)). Genuine disputes are not created through "[a] mere scintilla of evidence," *Nguyen v. CNA Corp.*, 44 F.3d 234, 237 (4th Cir. 1995), "[m]ere

unsupported speculation," *Ennis v. Nat'l Ass'n of Bus. & Ed. Radio, Inc.*, 53 F.3d 55, 62 (4th Cir. 1996), "mere belief or conjecture," *Doyle v. Sentry Ins.*, 877 F. Supp. 1002, 1005 (E.D. Va. 1995), or the "mere . . . building of one inference upon another," *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). In determining the "materiality" of facts, the Court is to consider "the actual quantum and quality of proof necessary" to support the non-moving party's claim, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986), and those facts that "address . . . the adequacy of the showing made by [the non-moving party and] . . . whether such a showing, if reduced to admissible evidence, would be sufficient to carry [the non-moving party's] burden of proof at trial." *Celotex Corp. v. Catrette*, 477 U.S. 317, 327 (1986).

The alleged genuine issues of material fact do not exist and are not created just because petitioners do not care for the facts and wish they were disputed. Most of the alleged disputes are addressed in the Statement of the Case and are briefly summarized below.

Lights

The fact that the lights on the first floor of he house went off as the officers were about halfway into the driveway (JA 1119, 1284) is not disputed. Petitioners' reliance upon the testimony of Matt Deane is misplaced. When Mr. Deane testified that the lights had been off for some time he was talking about the garage lights. With regard to the lights on the main floor of the house, no teen can recall what lights were on or if anyone turned them off. (JA 81,

306, 538, 651.) Testimony of witnesses to the effect that they do not know whether someone turned the lights off is insufficient to create a dispute.

Open Door

Each teen who fled the house claims that the other teen was behind him and shut the door. In any event, the boys were running from the house on a cold February night – one boy possibly without shoes. (JA 156, 661.) They were in a hury. They did not stick around to see if the door had properly latched. Indeed, Mr. Hunsberger testified that Officer Wood told Mr. Hunsberger that the door was ajar. (JA 985.) Mr. Hunsberger was not surprised as "that door doesn't always close properly...." (JA 985.) Again, no dispute of fact is created.

Ringing the Doorbell

Petitioners then question whether Sergeant Wood knocked at the door or rang the doorbell. This argument defies common sense and ignores the undisputed circumstances. The fleeing boys, before they fled, saw the officers approach the house as if to knock on the front door. (JA 149, 652.) Mr. Hunsberger admitted that when the doorbell works it is very soft and the doorbell box is not located in the basement with the teens or upstairs with the sleeping petitioners. (JA 964.)

Noise in Garage

The noise in the garage that both Sergeant Wood and Mr. Blessard heard and that Aaron

Cooper admits to making is then questioned because Deputy Edwards did not mention a noise in his report. (JA 64-65, 401, 1309, 1421 (Wood report).) Mr. Cooper knew that they heard him because, shortly after he shut and locked the door, Mr. Blessard knocked loudly on the basement door calling out for his stepdaughter. (JA 64-65, 1311, 1314.)

Concern for Stepdaughter

Most amazingly, petitioners find a disputed fact because Mr. Blessard's emotional state was not set forth in Sergeant Wood's report. They speculate that perhaps Mr. Blessard really did not care about the well-being of his stepdaughter. This contention is ridiculous given petitioners' description of Mr. Blessard's state as "maniacal" (Brief of Appellees filed in the Fourth Circuit Court of Appeals, p. 15), Mr. Hunsberger's comment that NW's father was worried sick (JA 966), and the teens' testimony that they heard beating on the basement door (JA 64-65) and heard him yelling for NW while in the house (JA 64-65, 289, 556, 762).

Express or Implied Consent

The Court of Appeals recognized that the parties dispute whether Sergeant Wood consented to Mr. Blessard's presence or Mr. Blessard merely followed Sergeant Wood into the house. The decision states, "[e]ven accepting as true petitioners' contention that Wood consented to Blessard's presence, the search was not unreasonable." Slip Op. at 15. The Court acknowledged this dispute, but

found it immaterial to its decision looking at it in a light most favorable to petitioners.

Both Sergeant Wood and the Court of Appeals considered all of the circumstances, and the culmination of the same, confronting Sergeant Wood at the time. According to petitioners, the Fourth Circuit decision overlooked the fact that the officers found nothing suspicious after the neighbor's first 911 call and then found suspicious activity after the second 911 call. The second 911 call in and of itself did not create the emergency. As the Fourth Circuit decision makes clear, it was the many suspicious events and observations after that call that rose to the level of an emergency need to enter the house. The fact that observation through certain windows did not show suspicious activity did not eliminate the suspicious events and observations that were made. The Court's opinion did not find that the second 911 call created an imminent emergency. Moreover, the fact that two of the vehicles belonged to the homeowners is irrelevant to whether or not the homeowners were present. It is a rare family that would take all of its vehicles on vacation.

The material facts are not in dispute. Petitioners' selective use of only certain testimony, disregard of other testimony, use of testimony taken out of context, and pure speculation cannot create disputes of material fact.

II. The Court of Appeals Correctly Held that Sergeant Wood was Entitled to Qualified Immunity Since He Did Not Violate the Constitution and, Even if a Violation Were to be Found, He is Still Entitled to Qualified Immunity Since the Law Was Not Clearly Established.

The Fourth Circuit Court of Appeals' decision is consistent with the precedent of this Court and other federal courts of appeals. Moreover, even if this Court were to find a constitutional violation, Sergeant Wood would still be entitled to qualified immunity. There is no compelling reason for the granting of the petition.

When qualified immunity is asserted, the Court looks to whether the facts show that the defendant violated the constitutional rights of the plaintiff and whether the right was clearly established at the time such that a reasonable official would know that his conduct was unlawful. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). After *Pearson* overruled *Saucier* as to a mandated order of consideration of the questions, courts have discretion to consider either of the prongs of the analysis first. *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009). If the answer to either question is no, then qualified immunity applies. In this case, the answer to both prongs is no.

A. The Standard Set Forth in *United States v. Moss*, which standard Petitioners do not contest, was Correctly Applied to Result in No Fourth Amendment Violation and is Consistent with this Court's Decision in *Brigham City v. Stuart*.

As the Fourth Circuit Court of Appeals stated very recently in discussing the Fourth Amendment and the Due Process Clause, "the Amendments are not rigid; they protect by insisting on judicial oversight, not by pressing inflexible rules." *Mora v. City of Gaithersburg*, 519 F.3d 216, 222 (4th Cir. 2008) (upholding warrantless search of luggage, van, and apartment and seizure of items following outside handcuffing of firefighter who called a hotline stating that he was suicidal, had weapons in his apartment, could understand shooting people at work and might as well die at work). The Court recognized that "the Fourth Amendment favors a warrant based on probable cause, but 'because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions.'" *Id.* (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). Exigent circumstances are noted as one of those exceptions. The Fourth Circuit applied the standard set forth by it in *United States v. Moss*, 963 F.2d 673 (4th Cir. 1992), and correctly held that Sergeant Wood did not violate the Hunsbergers' constitutional rights.

The question before the Court of Appeals in applying the standard was "whether the circumstances known to Sergeant Wood would create an 'objectively reasonable belief that an emergency

existed that required immediate entry to render assistance or prevent harm to person or property within.'" *Hunsberger v. Wood*, 570 F.3d 546, 555 (W.D. Va. 2009) (quoting *United States v. Moss*, 963 F.2d 673, 678 (4th Cir. 1992)). Petitioners do not contend that this standard is improper. Rather, they contend that the Court of Appeals ignored the "imminent danger" or "required immediate entry" requirement and that the "objectively reasonable belief" must be equivalent to probable cause.

An examination of cases decided under the emergency and community caretaker doctrines is instructive in reviewing the actions of Sergeant Wood and the standard applied by the court. This Court recognized in *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) (involving automobile impoundment), that law enforcement officers not only investigate crimes and apprehend criminals, but they act to protect citizens – their persons and their property. Communities expect their officers to serve and protect. Officers are expected to come to the aid and assistance of the citizens they serve. As LaFave stated,

> [Q]uite clearly police have occasion to enter premises without a warrant for a variety of ... purposes. The police have "complex and multiple tasks to perform in addition to identifying and apprehending persons committing serious criminal offenses"; by design or default, the police are also expected to "reduce the opportunities for the commission of some crimes through

> preventive patrol and other measures," "aid individuals who are in danger of physical harm," "assist those who cannot care for themselves," "resolve conflict," "create and maintain a feeling of security in the community," and "provide other services on an emergency basis.

3 W. LaFave, *Search and Seizure* § 6.6 at 389-90 (1996), *quoted in Wood v. Commonwealth*, 27 Va. App. 21, 33, 497 S.E.2d 484, 490 (1998) (en banc) (Annunziata, J., dissenting).

Courts have extended the recognition of this role to permit warrantless entries into homes under both the emergency doctrine (or the emergency aid doctrine) and the community caretaker doctrine.[6] The doctrines permit warrantless entries to protect persons or property. *Michigan v. Fisher*, 130 S. Ct. 546 (2009); *Brigham City v. Stuart*, 547 U.S. 398 (2006); *United States v. Moss*, 963 F.2d 673, 678 (4th Cir. 1992) (citing 2 W. LaFave, *Search and Seizure* § 6.6) (1987)), *United States v. Dart*, 747 F.2d 263 (4th Cir. 1984); *United States v. Gillenwaters*, 890 F.2d 679 (4th Cir. 1989); *Phillips v. Peddle*, 7 Fed. Appx. 175, 178 (4th Cir. 2001) (unpublished) (citing *Cady v. Dombrowski*, 413 U.S. 433 (1973)); and *United States v. Newbourn*, 600 F.2d 452 (4th Cir. 1979). *See also Love v. State*, 659 S.E.2d 835, 836 (Ga. App. 2008)

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[6] This Court made no reference to the community caretaking doctrine in *Brigham City*, but it appears that neither doctrine would include a requirement that the actions be divorced from an investigation of crime since motive is irrelevant to the analysis. 547 U.S. 398, 400, 404-05 (2006).

(search upheld where neighbor called 911 to report door open and no one appeared to be home although car was parked at house and there was no response to verbal calls).

In *Moss*, the court noted that the emergency doctrine requirements of "an objectively reasonable belief that an emergency existed that required immediate entry to render assistance or prevent harm to persons or property within" was not met because there was no indication that any illegal occupant was inside so there was no immediate danger to the cabin or anyone inside. *Moss*, 963 F.2d at 678 -79 (citations omitted). In this case, there were indications that an illegal occupant was inside the house.

The First Circuit Court of Appeals distinguished *Moss* on this point when it upheld the warrantless entry into a home. *United States v. Tibolt*, 72 F.3d 965, 970 (1st Cir. 1995). The officer in *Tibolt* responded to a security alarm that he thought was activated at the Tibolt residence. It was actually activated at a nearby residence. *Id.* at 967. The officer found an unlocked door and called inside receiving no response. *Id.* The court noted that the officers believed that the residents were away and they found an unlocked door which increased the likelihood of an intruder. *Id.* at 970. If the officers had not entered the house, they could not know if an intruder was present or if there was an injured or captured resident. *Id.*

The district court also addressed the emergency doctrine and found it applicable, in a case

with less compelling facts than the case at hand, where officers responded to a security alarm at a home. *United States v. Porter*, 288 F. Supp. 2d 716 (W.D. Va. 2003). Upon arrival at the home, the officers were told by two people that a young neighborhood girl had accidentally opened the back door and activated the alarm while attending a cookout next door. *Id.* at 717. There was no audible alarm upon arrival, no response to a knock, there were no signs of forced entry, and the back door was closed and unlocked. *Id.* The officers entered the house to see "if a crime was in progress or if there was anyone inside in need of assistance." *Id.* at 719. The Court said the emergency doctrine applies when the officer holds an objectively reasonable belief that "an emergency existed that required immediate entry to render assistance or prevent harm to person or property within." *Id.* at 720 (quoting *United States v. Moss*, 963 F.2d 673, 678 (4th Cir. 1992)). The court listed many cases where officers were permitted to enter homes after a reported burglary or in response to security alarms. *Id.* The court noted that, while the alarm itself together with an unlocked door would justify entry, *id.* at 721, this case required examination of the information from the neighbors that indicated no burglary occurred. *Id.* The court, in deferring to the officers' judgment, noted that, "the conduct of the officers in this instance was exactly the type of police work the community would expect, and possibly even demand." *Id.*

The Virginia Court of Appeals, again in a less compelling factual situation, while not addressing the emergency doctrine or the community caretaker

doctrine, found that exigent circumstances permitted the entry into a home by officers when a neighbor called and reported that the homeowner was out of town for two days and the front door was open. *Hill v. Commonwealth*, 441 S.E.2d 50 (Va. App. 1994), The neighbor wanted the officers to see if the home had been broken into. *Id.* The officers spoke with the neighbor and saw the front door open with a closed storm door. *Id.* They knocked and rang the doorbell with no response. *Id.* The officers then opened the unlocked storm door and announced themselves. *Id.* They looked in closets and under beds for a possible burglar and found marijuana plants. *Id.* at 50-51. The court found that the officers had probable cause to believe that the house had been unlawfully entered and they reasonably believed the burglar might still be in the house. *Id.* at 51. The officers had a "duty" "to determine whether Hill's house had, in fact, been burglarized, to apprehend the burglar, and to resecure the premises." *Id.*

Sergeant Wood had more of an objectively reasonable belief that an emergency existed that required immediate entry to render assistance or prevent harm to persons or property within than did the officers in the cases listed above. Although he had been told of reports of suspicious activity, told that the homeowners were gone, and observed suspicious activity himself, he refrained from entering the house when it appeared that there might not be anyone in the house anymore. When he found that a closed door was then open, he suspected that a person or persons fled the house. After looking in the garage and finding no one, at

that time, he had no reason to believe anyone else was in the house posing a danger to persons or property. After that, he learned of Mr. Blessard's missing daughter, that she was supposed to be somewhere else and that she was not answering her cell phone. He heard the noise in the garage followed by footsteps and the slamming and locking of the door. He then knew that someone was indeed in the house posing a danger to persons or property, and he made an immediate entry.

Petitioners contend that the standard set forth in *Moss* as applied by the Court of Appeals is improper under *Whiteley v. Warden*, 401 U.S. 560 (1971), and *United States v. Moses*, 540 F.3d 263 (4th Cir. 2008) (decided after the events of this case), because the Fourth Circuit did not demand that the objectively reasonable belief equal probable cause. The cases, however, are not factually similar to this case. *Whiteley* involved a warrantless arrest based upon an informant's tip where no exigent circumstances were involved. 401 U.S. at 563-64, 567. *Moses* discusses the standard to be applied where the officers have an interest in contraband. When contraband is involved, the officers must have probable cause that contraband will be found and then also show exigent circumstances – whether an objective officer could reasonably believe that evidence was on the verge of being destroyed. *Moses*, 540 F.3d at 270.

Notably, in a more factually similar case decided by this Court, probable cause is not mentioned as a requirement. *Brigham City v. Stuart*, 547 U.S. 398 (2006). Rather, the standard

set forth in *Brigham City* was whether the officers were objectively reasonable in their belief. *Id.* at 406. This is the same standard applied in *Moss* – whether the officers had an objectively reasonable belief that an emergency existed that required immediate entry to render assistance or prevent harm to person or property within. 963 F.2d at 678. *Brigham City* involved a situation where officers observed an assault upon a person in the house. The question was whether the officers were objectively reasonable in their belief that "the injured adult might need help and that the violence in the kitchen was just beginning." *Brigham City*, 547 U.S. at 406. The Court in *Brigham City* mentions the need to protect an occupant from "imminent injury." *Id.* at 404. This same standard is found in *Moss* where the emergency requires "immediate entry." 963 F.2d at 678.

In a case involving the warrantless search of the home of an individual who might have been considering mass murder, this Court allowed officers to take preventative actions. *Mora v. City of Gaithersburg*, 519 F.3d 216 (4th Cir. 2008). In approving a balancing test for preventive action, the Court pointed out the objective reasonableness standard. *Id.* at 224-25. As with *Brigham City*, there is no mention of probable cause.

Sergeant Wood had an objectively reasonable belief that an emergency existed that required immediate entry to render assistance or prevent harm to person or property within. This is all that is required. While hindsight would show that there was no danger of harm to persons or property at the

Hunsberger home, hindsight was not the perspective available to Sergeant Wood or the perspective by which the Court examines the circumstances.

B. *Wilson v. Layne* Supports Mr. Blessard's Presence in the House.

While no case law was found specifically addressing the situation in this case, *Wilson v. Layne*, 526 U.S. 603 (1999), supports the Court of Appeals decision rather than being in conflict with the decision as argued by petitioners.[7] *Wilson* examined whether or not the presence of the third parties in the house was "related to the objective of the authorized intrusion." 526 U.S. at 611. The United States Marshals conceded that the news reporter and photographer did not assist the police in their task. They were "not present for any reason related to the justification for police entry into the home...." *Id.* The Court of Appeals conducted the same analysis in this case. Mr. Blessard was able to state that JH was not his stepdaughter and would have been able to identify his stepdaughter had she been found. Because of his presence, Sergeant Wood did not have to question JH. Mr. Blessard was present for a reason related to the justification for entry. There is no constitutional prohibition to the presence of a third party in and of itself, and there is

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[7] The panel decision is not in conflict with *Buonocore v. Harris* as *Buonocore* involved a private person allegedly present for his own purposes unrelated to the search and conducting a search independent from that of the officers. *Buonocore*, 65 F.3d 347, 359 (4th Cir. 1995). Petitioners do not allege a separate independent search by Mr. Blessard.

no requirement that the third party's presence be necessary.[8]

Moreover, victims of burglaries have been permitted to assist in searches where the officer is searching for the stolen items pursuant to a warrant. *See, e.g., United States v. Robertson*, 21 F.3d 1030, 1034 (10th Cir. 1994); *State v. Dallmann*, 441 N.W.2d 912, 917 (N.D. 1989); *State v. Klosterman*, 317 N.W.2d 796, 803 (N.D. 1982); *State v. Ricci,* 472 A.2d 291, 298 (R.I. 1984). Similarly, Mr. Blessard did act "in aid of" Sergeant Wood by providing assistance as to the identification of his stepdaughter.

One of the purposes of Sergeant Wood's entry into the house was to look for Mr. Blessard's stepdaughter. (JA 1321.) Mr. Blessard's only purpose was to locate his stepdaughter. (JA 402.) Certainly, if the Fourth Amendment allows a burglary victim to assist an officer in identifying his property, it allows a father to assist an officer in identifying his stepdaughter.

C. The Panel Decision Properly Granted Qualified Immunity to Sergeant Wood.

Even if one believed that a Fourth Amendment violation occurred, the Court would

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[8] Whether or not Mr. Blessard was acting under color of state law or as an agent of the government is not an issue before this Court. The district court found it unnecessary to determine whether Blessard acted under color of state law because he acted in good faith, and that issue is not on appeal. *Hunsberger v. Wood*, 564 F. Supp. 2d 559, 571 (W.D. Va. 2008). Only the qualified immunity denial with regard to Sergeant Wood was appealed.

then have to analyze whether or not the law was clearly established such that a reasonable officer under the circumstances would understand that his actions were unlawful. This is true even if officers of reasonable competence could disagree on whether the action was reasonable. *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Springman v. Williams*, 122 F.3d 211, 214 (4th Cir. 1997). Under this standard, all but the "plainly incompetent or those who knowingly violated the law" are protected. *Malley*, 475 U.S. at 341. The cases conclusively demonstrate that Sergeant Wood is entitled to qualified immunity. Given the case law, a reasonable officer would not understand that his actions violated the petitioners' constitutional rights. Certainly, if reasonable judges differ as to the application of the law, reasonable officers could differ. *See Gable v. Lewis*, 201 F.3d 769, 774 (6th Cir. 2000) (Nelson, J., dissenting) ("we ought not to require Highway Patrol officers to be more prescient than Article III judges"); *Key v. Grayson*, 179 F.3d 996, 1002 (6th Cir. 1999), *cert. denied*, 528 U.S. 1120 (2000) ("if federal appellate judges could reasonably disagree [cannot say] reasonable official would have known"); *Griffith v. Truette*, 866 F. Supp. 254, 258 (D. Md. 1994) ("[s]ince even now reasonable lawyers and judges can disagree ...it follows that the defendants cannot be held to have known....").

Sergeant Wood was only doing what was demanded of him by his community under the circumstances presented to him and what was permitted by case law. Had Sergeant Wood done nothing despite being called to the house twice by 911 calls from a concerned neighbor with regard to

suspicious activity, having understood that the homeowners were out of town, having observed suspicious activity himself with all of the lights going out, no one answering the door despite seeing someone in the house, observing a closed door that was then open, and finally receiving a report of a missing, minor girl whose car was inexplicably found outside the house and whose stepfather could not make contact with her and then discovering that someone was still in the house, he would have been derelict in his duties. One can predict the justifiable consequences to Sergeant Wood had the Hunsbergers come home to discover they were victims of vandalism or had Mr. Blessard later discovered his missing child in need of assistance in the Hunsberger home.

CONCLUSION

Petitioners have not established any compelling reason for this Court to grant the Petition. Sergeant Wood respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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No. 09-689

Supreme Court, U.S.
FILED
MAR 18 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MARK J. HUNSBERGER; CHERYL A. HUNSBERGER,

Petitioners,

v.

J. A. WOOD, Deputy Sheriff, Botetourt County Sheriff's Office,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR REHEARING

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QUESTIONS PRESENTED/INTERVENING SUBSTANTIAL OR CONTROLLING GROUNDS FOR REHEARING

I. Whether the intervening cases of *Michigan v. Fisher*, ___ U.S. ___, 130 S. Ct. 546 (December 7, 2009); *Schreiber v. Moe*, ___ F.3d ___, WL724021 (6th Cir. March 4, 2010); and *Espinosa v. San Francisco*, ___ F.3d ___, WL775891 (9th Cir. March 9, 2010), conflict with the Fourth Circuit's application of the emergency and exigent circumstances exceptions to the warrant requirement of the Fourth Amendment in this case and suggest review by this Court?

II. Whether the recent Fourth Circuit case of *Culosi v. Bullock*, ___ F.3d ___, WL610625 (4th Cir. February 22, 2010), requires this Court to find that the Court of Appeals lacked jurisdiction over Deputy Wood's interlocutory appeal of denial of summary judgment because the district court denied qualified immunity based, in part, on the presence of genuine issues of material fact?

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Plaintiffs/Appellants: Mark and Cheryl Hunsberger

Defendants/Appellees: J.A. Wood and William Blessard*

*William Blessard remains a party to the district court proceeding, but this appeal has no bearing on him.

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CITATIONS TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED BY COURTS OR ADMINISTRATIVE AGENCIES

Hunsberger v. Wood,
559 U.S. ___ (February 22, 2010),
denying Petition for Writ of Certiorari

Hunsberger v. Wood,
583 F.3d 219 (4th Cir. 2009),
denying rehearing and rehearing en banc

Hunsberger v. Wood,
570 F.3d 546 (4th Cir. 2009)

Hunsberger v. Wood,
564 F. Supp. 2d 559 (W.D. Va. 2008)

ARGUMENT

Mark and Cheryl Hunsberger live in a residential neighborhood in the County of Botetourt, Virginia. They have three children, two teenage sons and a 10-year-old daughter. Late on a Friday night in February 2007, Respondent Wood, an 18-year veteran of the Botetourt County Sheriff's Office, entered and searched the Hunsberger home without a warrant while accompanied by William Blessard, a civilian. Wood's purported reason for searching the home was suspicion of vandals or burglars at the Hunsberger residence, based upon a neighbor's complaint, and/or Blessard's inability to contact his daughter via cell phone after finding her car parked in front of the Hunsberger home. The district court denied Wood's motion for summary judgment, but the Fourth Circuit reversed holding that Wood was entitled to qualified immunity.

Recent cases from this Court, and the Fourth, Sixth and Ninth Circuits constitute "intervening circumstances of a substantial or controlling effect or ... other substantial grounds not previously present" and thereby justify this Court's granting of this Petition to Rehear the Order denying the Hunsbergers' Petition for Writ of *Certiorari* as required by *Supreme Court Rule 44*.

I. The intervening cases of *Michigan v. Fisher*, ___ U.S. ___, 130 S. Ct. 546 (December 7, 2009), *Schreiber v. Moe*, ___ F.3d ___, WL724021 (6th Cir. March 4, 2010), and *Espinosa v. San Francisco*, ___ F.3d ___, WL775891 (9th Cir. March 9, 2010), conflict with the Fourth Circuit's application of the emergency and exigent circumstances exceptions to the warrant requirement of the Fourth Amendment in this case and suggest review by this Court.

The recent cases of *Michigan v. Fisher*, ___ U.S. ___, 130 S. Ct. 546 (December 7, 2009), *Schreiber v. Moe*, ___ F.3d ___, WL724021 (6th Cir. March 4, 2010), and *Espinosa v. San Francisco*, ___ F.3d ___, WL775891 (9th Cir. March 9, 2010), when compared to the Fourth Circuit's decision in *Hunsberger v. Wood*, 570 F.3d 546 (4th Cir. 2009), *reh'g and reh'g en banc den'd*, 583 F.3d 219 (4th Cir. 2009), create a conflict among this Court, the Sixth and Ninth Circuits and the Fourth Circuit. In this important area of constitutional law this Court should grant *certiorari* to ensure uniform application of Fourth Amendment protections.

This Court found in *Michigan v. Fisher* that pursuant to the emergency aid exception "law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from *imminent* injury." *Fisher*, 130 S. Ct. at 548 (*citation and internal quotations omitted*) (*emphasis added*).

Officers in *Fisher* responded to Fisher's residence on a "complaint of a disturbance." *Id.* at 547.

> Upon their arrival, the officers found a household in considerable chaos: a pickup truck in the driveway with its front smashed, damaged fenceposts along the side of the property, and three broken house windows, the glass still on the ground outside. The officers also noticed blood on the hood of the pickup and on clothes inside of it, as well as on one of the doors to the house. (It is disputed whether they noticed this immediately upon reaching the house, but undisputed that they noticed it before the allegedly unconstitutional entry.) Through a window, the officers could see respondent, Jeremy Fisher, inside the house, screaming and throwing things. The back door was locked, and a couch had been placed to block the front door.
>
> The officers knocked, but Fisher refused to answer. They saw that Fisher had a cut on his hand, and they asked him whether he needed medical attention. Fisher ignored these questions and demanded, with accompanying profanity, that the officers go to get a search warrant. Officer Goolsby then pushed the front door partway open and ventured into the house. Through the window of the

> open door he saw Fisher pointing a long gun at him. Officer Goolsby withdrew.

Id.

In this case, and unlike *Fisher* (and unlike *Brigham City v. Stuart*, 547 U.S. 398, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006)), Deputy Wood did not encounter a tumultuous situation, found no signs of recent injury, and saw no violent or illegal behavior occurring to buttress the 911 caller's complaint. *Id.* at 548-49. In short, Wood had no reasonable basis to believe that anyone inside the home was in need of immediate assistance, and for the Fourth Circuit to have so held conflicts with this Court's decision in *Fisher*.

Likewise the Sixth Circuit case of *Schreiber v. Moe*, ___ F.3d ___, WL724021 (6th Cir. March 4, 2010), conflicts with the Fourth Circuit's decision here. In *Schreiber* officer Moe responded to an anonymous report of a domestic disturbance involving a father and daughter.

> Moe claims that, upon arriving at Schreiber's apartment, he could hear an angry male voice yelling profanities, and Schreiber admits that he was in a "heated" discussion with Sarah. Moe proceeded to knock on the door, which was answered by a young boy around the age of ten. At this point, Moe could see Schreiber yelling at someone within the home. The parties seem to dispute, however, whether Sarah was visible to

> Moe at this point; Schreiber claims that she was, and Moe claims that she was not. Moe asked the young boy if Sarah was okay. Shortly thereafter, Schreiber came to the door, and according to Moe, Schreiber was shouting phrases such as "'what the fuck do you want'" and "'I hate the fucking police.'" According to Moe, Moe responded by explaining that he was there to check on Sarah's welfare, only to have Schreiber reply "'no, you fuckin' don't.'" Schreiber does not deny making these statements, but does claim that he asked for a warrant and also that he explicitly told Moe that Sarah was fine. Moe then entered the home before Schreiber could close the door.

Id. at *1 (*citations omitted*).

In discussing the law regarding exigent circumstances, the Sixth Circuit, citing *Fisher*, *supra*, stated that,

> "officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Fisher*, 130 S. Ct. at 548 (internal quotation marks omitted). However, there must be "an objectively reasonable basis for believing ... that a person within the house is in need of immediate aid." *Id.* (internal quotation

> marks omitted). In civil cases, this question is normally left to the jury, but only if "there is room for a difference of opinion." *See Ingram v. City of Columbus*, 185 F.3d 579, 587 (6th Cir. 1999) (internal quotation marks omitted).

Id. at *4.

Under the facts of this case, Wood had no reasonable basis to believe that "a person within the house [was] in need of *immediate* aid." *Id.* (*internal quotations omitted*) (*emphasis added*). The Fourth Circuit's holding in this case eliminates the requirement that an imminent emergency exist, and is in conflict with the recent (and historic) holdings of this Court and the other Circuit Courts of Appeal.

Next, the case of *Espinosa v. San Francisco*, ___ F.3d ___, WL775891 (9th Cir. March 9, 2010), is in conflict with the Fourth Circuit's decision here. In *Espinosa* the Ninth Circuit upheld denial of qualified immunity in the warrantless entry of an apartment where a "neighbor stated that the front door of the apartment was swinging open and that the location could be a drug house." *Id.* at *1. Upon arrival police officers found the front door closed, but could slightly open it with a push, and saw several items inside when looking through the windows. *Id.* The officers understood that the apartment was supposed to be vacant. *Id.* at *3. In the course of the officers' search they shot and killed a person legally present in the apartment. *Id.* at *1. The Ninth Circuit upheld the district court's finding that neither the

emergency nor the exigent circumstance exceptions to the warrant requirement justified the officers' entry into the apartment. *Id.* at *3. Specifically, the court found that the "evidence does not establish that [the defendant officer(s)] could have had an objectively reasonable belief that a life-threatening emergency was occurring or a crime was in progress." *Id.* Further, the court found significant that, "[t]he record also does not show that [backup officers] made inquiries about other facts which would allow a warrantless entry and search of the apartment." *Id.* at *4.

Similarly, in this case Wood lacked "an objectively reasonable belief that a life-threatening emergency was occurring or a crime was in progress" and failed to make "inquiries about other facts which would allow a warrantless entry and search." *Id.* at *3 and *4, respectively. For example, (1) when Appellant first responded to the scene, nearly two hours before his search of the home, his observations admittedly revealed nothing of suspicion, *Hunsberger*, 570 F.3d at 550; (2) Upon Wood's second trip to the home he and another deputy "shined [their] flashlights into the windows" of the home and saw nothing amiss; and (3) Wood knowingly and purposefully ignored the two Hunsberger vehicles parked at the rear of the home as evidence that someone who lived there may be home: specifically, he requested only "info for vehicles that didn't belong there" when he asked his dispatch center to contact the owners of the vehicles parked at the home. The Fourth Circuit ignored these facts and therefore, its holding is in conflict with the Ninth Circuit's holding in *Espinosa*.

In this case Wood's *post hoc* justification for searching the Hunsberger home without a warrant was to assist a civilian in locating his teenage step-daughter and/or to determine whether the Hunsberger home was being vandalized or burgled. The undisputed, objective facts in the light most favorable to the Hunsbergers failed to establish a serious imminent threat to person or property, and therefore the emergency and exigent exceptions to the warrant requirement were not met, and to hold such is in direct conflict with the recent holdings of this Court and the Sixth and Ninth Circuits.

The conflict between this Court, the Sixth and Ninth Circuits and the Fourth Circuit is an intervening and substantial ground that justifies this Court granting this Petition to Rehear and granting the underlying Petition for Writ of *Certiorari*.

II. The recent Fourth Circuit case of *Culosi v. Bullock*, ___ F.3d ___, WL610625 (4th Cir. February 22, 2010), requires this Court to find that the Court of Appeals lacked jurisdiction over Deputy Wood's interlocutory appeal of denial of summary judgment because the district court denied qualified immunity based, in part, on the presence of genuine issues of material fact.

Petitioners Mark and Cheryl Hunsberger argued before the district court and the Fourth Circuit Court of Appeals that genuine issues of material fact existed that precluded a determination

of qualified immunity and hence, summary judgment for Wood. An order denying summary judgment based on a finding that genuine issues of material fact exist is not an order subject to immediate appeal. *Culosi v. Bullock*, ___ F.3d ___, WL610625 (4th Cir. February 22, 2010), *citing Johnson v. Jones*, 515 U.S. 304, 319-20, 115 S. Ct. 2151, 132 L.Ed.2d 238 (1995).

In *Culosi* the Fourth Circuit held that the question of whether a law enforcement officer intentionally or accidentally shot a suspect in an illegal gambling investigation created a material issue of fact. *Id.* at *4. Based upon FRCiP 56(c)(2) and 28 U.S.C. § 1291, the court therefore lacked jurisdiction over the interlocutory appeal by the officer seeking summary judgment based upon qualified immunity. *Id.* The Fourth Circuit exercised judicial restraint despite the district court having "expressed deep skepticism as to whether any one or more of Plaintiffs' myriad of theories would be found persuasive by a jury." *Id.* at *5, fnte 5.

The Fourth Circuit found that it lacked jurisdiction despite that the district court never explicitly held that it denied summary judgment based upon a finding that material facts were in dispute: "the district court plainly, *even if only implicitly*, acted on the basis that there existed in this case genuine disputes of material fact and that the resolution of such disputes at trial was necessary before the legal issue of Officer Bullock's entitlement to qualified immunity could be determined," and "the district court ultimately (*if only impliedly*) concluded, the Plaintiffs have generated genuine

disputes of material, historical fact." *Id.* at *5, and *5, ftnte 5, respectively (*emphasis added*).

The Fourth Circuit did not afford Mark and Cheryl Hunsberger the same judicial restraint. The reasoning of *Culosi* applies with at least equal force to the facts of this case. Disputed facts in this case create jury issues. Nonetheless, the Fourth Circuit failed to view the facts in the light most favorable to the Hunsbergers: the panel opinion is totally devoid of any such reference to considering the evidence in the light most favorable to the non-moving parties, and it adjudicated disputed facts against the Hunsbergers. *Hunsberger v. Wood*, 570 F.3d 546, 549-52 (4th Cir. 2009), *reh'g and reh'g en banc den'd* 583 F.3d 219 (4th Cir. 2009). In short, the Fourth Circuit improperly exercised jurisdiction.

The disputed facts and conclusions that the Fourth Circuit rendered contrary to the Hunsbergers included that:

> First, the circumstances indicated the strong possibility of an unauthorized intruder in the home. Klik, the Hunsbergers' neighbor, had said that she thought the Hunsbergers were out of town. There appeared to be someone inside the home who wished to avoid contact with the police; when the officers first arrived, someone in the house turned the lights off, and then later the open door in the garage suggested that someone had fled the home while the officers were at the

> front door. Three cars not belonging to the Hunsbergers were parked in front of the house. No one came to the front door when the officers rang the doorbell, and no one answered when Wood and Blessard knocked on the basement door repeatedly. Furthermore, a vacant home in the neighborhood had recently burned down as the apparent result of unauthorized use.
>
> ...
>
> Second, there was evidence that a minor girl was in the home, given that her car was parked in front of the house. The girl's stepfather said that she was not supposed to be at the home and was exceedingly concerned for her welfare, especially given that it was the middle of the night. ... The fact that the girl was not answering her cell phone suggested the possibility that she was hurt or otherwise in need of assistance.

Hunsberger, 570 F.3d at 555. As was more fully discussed in the Hunsberger's Petition for Writ of *Certiorari* and Petition to Rehear and Rehear *En* Banc, the conclusions and the facts upon which the Fourth Circuit relied are genuinely in dispute.

As the Fourth Circuit held in *Culosi* it should have held in this case: "that the order of the district court denying qualified immunity to [defendant] is not immediately appealable because the district

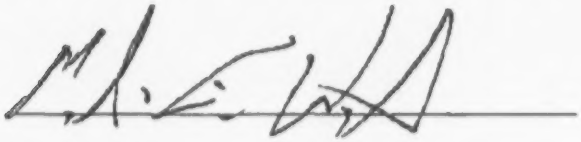
court merely determined that genuine disputes of material fact existed - a determination not subject to interlocutory appeal. *See Johnson v. Jones*, 515 U.S. 304, 319-20, 115 S.Ct. 2151, 132 L. Ed. 2d 238 (1995)." *Culosi*, 2010 WL 610625, at *1 (4th Cir. February 22, 2010).

CONCLUSION

The Fourth Circuit erroneously exercised jurisdiction by failing to acknowledge that the district court denied summary judgment based, in part, on genuine issues of material fact, in conflict with its more recent holding in *Culosi v. Bullock*. Further, the Fourth Circuit's holding in this case creates a conflict between the Fourth Circuit and this Court and the Sixth and Ninth Circuits in the application of the emergency and exigent circumstance exceptions to the warrant requirement and the intervention of this Court is necessary to resolve this conflict. In the words of the four dissenting members of the Fourth Circuit, "The panel's holding works an injustice on the Hunsbergers and creates an unsupportable and unsound precedent." *Hunsberger*, 583 F.3d 219, 228 (4th Cir. 2009).

WHEREFORE, Mark and Cheryl Hunsberger pray that the Court would grant this Petition to Rehear, grant the underlying Petition for Writ of *Certiorari*, and reverse the judgment of the Fourth Circuit.

Respectfully submitted,
MARK AND CHERYL HUNSBERGER



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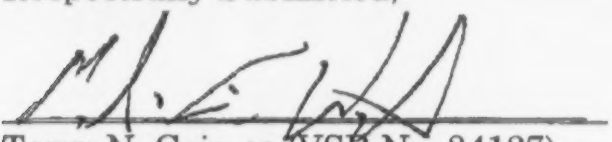
CERTIFICATE, IN ACCORDANCE WITH RULE 44(2)

Petitioners certify that the above petition for rehearing is presented in good faith and not for any delay and is restricted to the grounds specified in Rule 44.2.

Respectfully Submitted,



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